No. 89-390-CFX
Status: GRANTED

Title: Pension Benefit Guaranty Corporation, Petitioner
v.
LTV Corporation , et al.

Docketed:
September 11, 1989

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Beck,Jeanne K.

Counsel for respondent: Kaden,Lewis B., King,R. A., Roberts,William H., Mallory,Kathryn, Zweibel,Joel B., Phelan,Robin E., Booth,Edgar H., Powar,Lee D., Cogan,Brian M.

Entry	Date	Note	Proceedings and Orders
1	Jul 28 1989	G	Application (A89-84) to extend the time to file a petition for a writ of certiorari from August 10, 1989 to September 25, 1989, submitted to Justice Marshall.
2	Aug 1 1989		Application (A89-84) granted by Justice Marshall extending the time to file until September 10, 1989.
3	Sep 11 1989	G	Petition for writ of certiorari filed.
4	Sep 11 1989		Appendix of petitioner filed.
5	Sep 27 1989		Brief of respondents David H. Miller, et al. in opposition filed.
6	Oct 4 1989		DISTRIBUTED. October 27, 1989
7	Oct 6 1989		Waiver of right of respondent Subcommittee of Parent Creditors to respond filed.
8	Oct 11 1989		Brief amicus curiae of United States filed.
9	Oct 11 1989		Brief of respondents LTV Corporation, et al. in opposition filed.
13	Oct 11 1989	G	Motion of Armco, et al. for leave to file a brief as amici curiae filed.
10	Oct 12 1989		Brief of respondent Official Committee of Equity Security Holders in opposition filed.
11	Oct 16 1989	X	Reply brief of petitioner Pension Benefit Guaranty Corp. filed.
12	Oct 16 1989		Waiver of right of respondent BancTexas, Dallas, N.A. to respond filed.
14	Oct 30 1989		Motion of Armco, et al. for leave to file a brief as amici curiae GRANTED.
15	Oct 30 1989		Petition GRANTED. ***
17	Dec 13 1989		Brief of respondents David H. Miller and William W. Shaffer filed.
21	Dec 13 1989	G	Motion of American Society of Pension Actuaries for leave to file a brief as amicus curiae filed.
18	Dec 14 1989		Brief of petitioner Pension Benefit Guaranty Corp. filed.
19	Dec 14 1989		Joint appendix filed.
20	Dec 14 1989		Brief amicus curiae of United States filed.
22	Dec 14 1989	G	Motion of Armco, et al. for leave to file a brief as amici curiae filed.
23	Dec 14 1989	G	Motion of Retired Employees Benefits Coalition, Inc. for leave to file a brief as amicus curiae filed.
24	Dec 20 1989	D	Motion of Bethlehem Steel Corporation, et al. for leave

No. 89-390-CFX

Entry	Date	Note	Proceedings and Orders
			to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
26	Dec 22 1989	D	Motion of respondents David H. Miller and William W. Shaffer for divided argument filed.
25	Dec 27 1989	D	Motion of respondent LTV Bank Group for divided argument and for additional time for oral argument filed.
31	Jan 2 1990	D	Motion of respondent Official Committee of Unsecured Creditors of LTV Steel Company, Inc. and Certain Affiliates for divided argument filed.
32	Jan 2 1990	D	Motion of respondent Official Parent Creditors' Committee of the LTV Corporation for divided argument filed.
30	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 27, 1990. (3RD CASE)
33	Jan 6 1990	D	Motion of respondent BancTexas, Dallas, N. A. for divided argument filed.
27	Jan 8 1990		Motion of American Society of Pension Actuaries for leave to file a brief as amicus curiae GRANTED.
28	Jan 8 1990		Motion of Armco, et al. for leave to file a brief as amici curiae GRANTED.
29	Jan 8 1990		Motion of Retired Employees Benefits Coalition, Inc. for leave to file a brief as amicus curiae GRANTED.
40	Jan 11 1990		Brief of respondent BancTEXAS Dallas filed.
34	Jan 16 1990		Motion of Bethlehem Steel Corporation, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED.
35	Jan 16 1990		Motion of respondents David H. Miller and William W. Shaffer for divided argument DENIED.
36	Jan 16 1990		Motion of respondent LTV Bank Group for divided argument and for additional time for oral argument DENIED.
37	Jan 16 1990		Motion of respondent Official Committee of Unsecured Creditors of LTV Steel Company, Inc. and Certain Affiliates for divided argument DENIED.
38	Jan 16 1990		Motion of respondent Official Parent Creditors' Committee of the LTV Corporation for divided argument DENIED.
39	Jan 16 1990		Motion of respondent BancTexas, Dallas, N. A. for divided argument DENIED.
41	Jan 16 1990		Brief amici curiae of AFL-CIO, et al. filed.
42	Jan 16 1990		Brief of respondents LTV Corporation, et al. filed.
43	Jan 16 1990		Brief of respondent Official Parent Creditors' Committee of LTV filed.
44	Jan 16 1990		Brief of respondent Official Committee of Unsecured Creditors of LTV Steel Co. filed.
45	Jan 16 1990		Brief amicus curiae of Wheeling-Pittsburgh Steel Corporation filed.
47	Jan 16 1990	X	Brief of respondent LTV Bank Group filed.
48	Jan 16 1990	X	Brief amicus curiae of Ohio filed.
49	Jan 16 1990	X	Brief of respondent Official Committee of Equity Security Holders filed.

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Entry	Date	Note	Proceedings and Orders
46	Jan 17 1990		CIRCULATED.
50	Feb 13 1990	X	Reply brief of petitioner Pension Benefit Guaranty Corp. filed.
51	Feb 27 1990		ARGUED.

No. 89-390 (1)

In The
Supreme Court of the United States
October Term, 1989

Pension Benefit Guaranty Corporation,
Petitioner,

v.

The LTV Corporation, LTV Steel Company, Inc., Official Committee of Unsecured Creditors of LTV Corporation, Subcommittee of Parent Creditors of the Official Committee of Unsecured Creditors of LTV Corporation, LTV Bank Group, Official Committee of Equity Security Holders, BancTexas Dallas, N.A., Fifth Third Bank, Huntington National Bank, Citibank, N.A., David H. Miller, and William W. Shaffer,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The Pension Benefit Guaranty Corporation ("PBGC") is a federal government corporation charged by Congress with administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974, including the pension plan termination insurance program. In the present case, in order to prevent the shifting of over $2 billion in liabilities to the insurance program it administers, PBGC restored certain pension plans that it had previously terminated. That action was vacated by the district court and the court of appeals affirmed. The questions presented are:

1. Where PBGC is statutorily authorized to restore terminated pension plans "in any such case in which [PBGC] determines such action to be appropriate and consistent with its duties under [ERISA]," 29 U.S.C. § 1347, may a reviewing court foreclose the agency from considering whether restoration is appropriate to remedy abuse of the insurance program?

2. May a reviewing court substitute its judgment for PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances?

3. May a reviewing court vacate a restoration decision under 29 U.S.C. § 1347 because PBGC focused "inordinately" on ERISA and failed to defer to selected policies underlying the bankruptcy and labor laws?

4. When an agency takes informal administrative action under a statute that sets forth no procedural requirements for exercise of its authority, may a reviewing court substitute its judgment for the agency's as to the appropriate procedures to be followed?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ———

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 875 F.2d 1008, and is reprinted at pages 1a-27a of the Appendix to this Petition ("Pet. App.").[1] The judgment of the United States

[1] The Appendix is bound in a separate volume.

District Court for the Southern District of New York dated September 13, 1988, from which appeal was taken, and the district court's opinion of June 22, 1988, reported at 87 Bankr. 779, are reprinted at Pet. App. 132a and 28a-131a.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1989. Pet. App. 1a. On August 1, 1989, Justice Marshall granted an extension of time within which to file a petition for certiorari until and including September 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, which are set forth at Pet. App. 133a-157a.[2]

STATEMENT OF THE CASE

This case concerns the efforts of the PBGC to prevent large companies from abusing the pension plan termination insurance program by shifting billions of dollars in pension liabilities to the PBGC while effectively continuing their pension plans. Faced with a rapidly-rising deficit and ever-increasing premiums, the PBGC acted in September 1987, pursuant to its broad authority under Section 4047 of ERISA, to return to The LTV Corporation and its wholly-owned subsidiary, LTV Steel Com-

[2] ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) ("SEPPAA"), and again in 1987 by the Pension Protection Act, Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987) ("PPA"). Because the PPA amendments do not apply in this case, citations to ERISA herein are to the statute as amended by SEPPAA, as found in 29 U.S.C. (1982 and Supp. IV 1986), unless otherwise expressly noted.

pany, Inc. (collectively "LTV"), three purportedly terminated pension plans with unfunded liabilities of over $2 billion. The PBGC did so to prevent abuse of the pension insurance program and because LTV's financial circumstances no longer justified termination. The court of appeals, however, affirmed a district court ruling vacating PBGC's action. Review is necessary because the court's decision, and the rationale underlying it, could have a crippling impact on the pension insurance program.

Statutory Background

The PBGC is a wholly-owned United States government corporation, with a Board of Directors composed of the Secretaries of Labor, Treasury and Commerce. 29 U.S.C. §§ 1301 *et seq.*[3] Modeled after the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation, the PBGC and its insurance program were established in 1974 "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (quoting 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen)). Thus, PBGC protects the pension benefits of the 30 million American workers in the private sector who participate in single-employer defined benefit pension plans.

When a covered pension plan terminates with insufficient assets to satisfy promised benefits, the PBGC becomes trustee of the plan, takes over the plan's assets and liabilities, and, subject to statutory limitations, pays all "nonforfeitable" benefits, *i.e.*, those benefits to which participants have earned entitlement under the plan terms as of the date of termination. 29 U.S.C. §§ 1301(a)(8), 1322(a), (b). Active plan participants cease to earn additional benefits under the plan and lose entitlement to

[3] The PBGC has independent litigating authority. 29 U.S.C. § 1302(b)(1).

most benefits not yet fully earned on the date of plan termination. Retired participants lose benefit amounts in excess of the amount insured by PBGC. *See* 29 U.S.C. § 1322; 29 C.F.R. pt. 2621 (1988).

In fiscal year 1988, the PBGC paid $324.7 million in insured benefits to 113,000 participants in 1,476 terminated single-employer pension plans. The cost of this insurance is borne primarily by employers who maintain ongoing pension plans, who are required by statute to pay annual premiums. 29 U.S.C. §§ 1306, 1307. The insurance program is also financed by statutory liability imposed on employers who terminate underfunded pension plans. Upon termination, the employer becomes liable to the PBGC, generally for 75 percent of the amount by which the plan is underfunded for the benefits that PBGC insures. *See* 29 U.S.C. § 1362(b). However, because PBGC historically has recovered only a small portion of that liability, Congress repeatedly has been forced to increase the annual premiums.[4] Despite these repeated increases, in its most recent Annual Report PBGC reported liabilities of $4 billion and assets of only $2.4 billion, leaving a deficit of more than $1.5 billion, exclusive of the liabilities at issue in this case.

Plan termination is the insurable event under Title IV. Plans may be terminated "voluntarily" by an employer or "involuntarily" by the PBGC. Title IV permits voluntary terminations only if not barred by the terms of an existing collective bargaining agreement and, in the case of an underfunded plan, only if the employer meets detailed financial distress tests. 29 U.S.C. § 1341(a)(3), (c). The PBGC may, however, involuntarily terminate a pension plan, notwithstanding a collective bargaining agreement. It may do so if it determines, for example, that a plan has not met ERISA's minimum funding standards or that the risk to the insurance program may otherwise increase unreasonably. 29 U.S.C. § 1342(a).

[4] Premiums originally were fixed at an annual rate of $1.00 per participant in 1974. ERISA § 4006(a)(3), 88 Stat. 829 (1974). The rate was raised in January 1978 to $2.60. Pub. L. No. 95-214, 91 Stat. 1501, 1502 (1977). With the enactment of SEPPAA in 1986, the premium was raised to $8.50. SEPPAA § 11005(a)(1), 100 Stat. 240-41 (codified at 29 U.S.C. § 1306(a)(3) (Supp. IV 1986)). And under PPA, the variable rate premium ranges from $16 to $50 per participant. PPA § 9331(a), (b), 101 Stat. 1330-367 to 1330-368 (codified at 29 U.S.C. § 1306(a)(3) (Supp. V 1987)). Congress plainly did not anticipate, when it first established this insurance program, the volume and size of claims the program would be required to assume.

Once a plan has been terminated, PBGC retains broad authority to reinstate it. Thus, Section 4047 of ERISA provides that:

> In the case of a plan which has been terminated under section 4041 or 4042 [29 U.S.C. §§ 1341, 1342], the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under [Title IV of ERISA], to take such action as may be necessary to restore the plan to its pretermination status . . . .

29 U.S.C. § 1347. When a plan is restored, full plan benefits and accruals are reinstated, and the employer, rather than PBGC, is again responsible for the plan's unfunded liabilities.

The PBGC has determined restoration to be "appropriate and consistent with its duties under Title IV" where an employer terminates a pension plan in order to take advantage of Title IV insurance, but then establishes "follow-on" pension arrangements that make up the benefits the PBGC does not insure. In such circumstances, the combination of PBGC insurance payments and follow-on benefits allows employers to provide substantially the same benefits as if no termination had occurred. The result is a PBGC subsidy for an employer's ongoing benefit program. This may be illustrated by the case of a

plan participant who was receiving $1200 per month in benefits before plan termination. If $800 of that amount is insured under Title IV, the PBGC will pay the $800, while the employer makes up the $400 difference through follow-on plans. Plan assets may be available to cover $200 of the $800 that is insured, leaving the insurance program responsible for $600, except to the extent of PBGC's recovery from the employer. And, although the PBGC is generally entitled to claim 75% of its $600 from the employer, the agency historically recovers only pennies on the dollar. The employer has thus succeeded in shifting significant unfunded pension liabilities to the PBGC, while continuing to provide equivalent ongoing benefits at a substantially reduced cost.

The PBGC has determined that such follow-on pension arrangements abuse the pension insurance program because they negate Title IV's insurable event—termination. Congress crafted the single-employer insurance program to provide certain basic benefits under plans that actually terminate, not to provide supplemental financing for an employer's ongoing pension program.[5] Therefore, as a previous Chairman of PBGC's Board of Directors, former Secretary of Labor William E. Brock, stated in 1987, the PBGC and its Board of Directors "have long opposed abusive follow-on retirement arrangements, which use termination insurance funds to help pay the cost of an ongoing retirement program." AR 1583, Pet. App. 180a.[6] In fact, beginning as early as 1981, the agency warned in three cases involving separate employers that the establishment of follow-on arrangements would negate or

[5] *Compare* 29 U.S.C. § 1431 (requiring PBGC to "provide . . . financial assistance" to ongoing *multiemployer* plans that are experiencing financial hardship).

[6] The designation "AR" refers to the administrative record of the PBGC's restoration decision. This 1592-page record, excerpts from which are included at Pet. App. 159a-183a, was an Exhibit to the Joint Appendix filed in the court of appeals. The "AR" page numbers are identical to the Joint Appendix Exhibit page numbers.

preclude the termination of the pension plans at issue, and could result in restoration of already-terminated plans under section 4047 of ERISA. PBGC Opinion Letter 81-11, Pens. Rep. (BNA) No. 367 at R-3 (May 11, 1981), LEXIS, Labor Library, PBGC file, AR 198 (Pet. App. 159a); PBGC Opinion Letter (unpublished) (April 24, 1981), AR 204 (Pet. App. 165a); PBGC Opinion Letter 86-27, 14 Pens. Rep. (BNA) No. 10 at 306 (Dec. 17, 1986), LEXIS, Labor library, PBGC file, AR 211 (Pet. App. 172a).

Facts and Proceedings

This case arose after The LTV Corporation ("LTV Corp.") and many of its subsidiaries, including LTV Steel Company, Inc. ("LTV Steel"), filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York in July 1986. Pet. App. 6a-7a. At that time, LTV Steel sponsored three defined benefit pension plans ("the Plans"), two of which had been negotiated in collective bargaining with the United Steelworkers of America ("USWA" or "union"). Historically underfunded, the Plans had, by late 1986, total unfunded liabilities for promised benefits of almost $2.3 billion, including approximately $2.1 billion in benefits covered by PBGC insurance. AR 8.

"LTV readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. This could happen only if the Plans were terminated, with the PBGC assuming responsibility for the unfunded liabilities, and new pension arrangements could be negotiated. LTV, however, could not terminate the Plans voluntarily because the USWA objected to termination, and because LTV could not satisfy Title IV's financial distress tests. *See* AR 407-10; 29 U.S.C. § 1341(a)(3), (c). LTV therefore sought to have the PBGC terminate the Plans. AR 409-10.

In December 1986, LTV advised the PBGC that the company could not and would not fund the Plans. AR 229. Without additional funding, PBGC's internal working group estimated that the \$2.1 billion in underfunding would increase by \$65 million by December 1987 and by another \$63 million by December 1988, unless the Plans were immediately terminated. AR 8. Moreover, extensive plant shutdowns were projected that would have required the payment of "shutdown benefits," increasing the Plans' liabilities by as much as \$300 to \$700 million. AR 9.[7] The PBGC estimated that up to \$500 million of that amount was covered by PBGC insurance. *Id.* Consequently, the PBGC determined that the Plans should be terminated because "the possible long-run loss of the corporation with respect to the plan[s] [could] reasonably be expected to increase unreasonably if the plan[s] [were] not terminated." 29 U.S.C. § 1342(a). AR 10. The PBGC accordingly commenced termination proceedings in the United States District Court for the Southern District of New York, and, with LTV's consent, the Plans were terminated effective January 13, 1987. AR 1533-41.[8]

Because Plan participants lost benefits as a result of the termination, the USWA filed an adversary action against LTV in the bankruptcy court, challenging the

[7] Under the Plans, a plant shutdown makes certain participants eligible for "shutdown benefits," accelerating their entitlement to a normal retirement pension, with no reduction in the amount of that pension to reflect the earlier benefit commencement date. Because the PBGC guarantees only "nonforfeitable" benefits to which participants are entitled on the date of plan termination, shutdown benefits are not insured if the shutdown occurs after termination. 29 U.S.C. §§ 1301(a)(8), 1322(a).

[8] On or about November 24, 1987, the PBGC filed proofs of claim in the bankruptcy court for the liabilities resulting from the termination of the Plans, contingent on the outcome of the restoration litigation. LTV and its creditors are vigorously opposing these claims, and the matter has yet to be adjudicated.

terminations and asking LTV to make up the lost benefits. *See* AR 242. In settlement of that action, LTV Steel and the union negotiated an interim collective bargaining agreement that included new pension arrangements specifically designed to continue service under the terminated Plans and to make up benefits lost under those Plans. AR 237, 239-42, 1561-64.

From at least the time these new benefit arrangements were first tentatively negotiated in May 1987, the PBGC advised LTV that they violated the PBGC's longstanding policy against abusive "follow-on" plans. AR 195-96. The PBGC met with LTV and union representatives on July 9, 10 and 13, 1987 to discuss the follow-on plans. AR 649-56, 1572. In these meetings, the PBGC advised LTV and the union of alternative arrangements they could adopt to provide relief to retirees and employees without abusing ERISA. *Id.* Even though it knew restoration was an option for the agency, LTV rejected this advice. Instead, LTV asked the bankruptcy court to approve the follow-on plans in the collective bargaining agreement and virtually identical follow-on plans for its salaried employees. AR 230. At a hearing on July 16, 1987, PBGC's Executive Director and another agency official submitted detailed affidavits explaining again the PBGC's objections to the plans, AR 190-227, and the Executive Director was cross-examined about these objections. AR 592-604. The bankruptcy court nevertheless approved the establishment of the follow-on plans. AR 624, 1554-56. In doing so, the bankruptcy court noted that PBGC "may have legal options or avenues that it can assert administratively . . . to implement its policy goals. Nothing done here tonight precludes the PBGC from pursuing these options . . . ." AR 623.

By early August, 1987, each of the financial factors on which the PBGC had relied in terminating the Plans had changed significantly. AR 643-45, 503-04. The steel industry, including LTV Steel, was experiencing a dra-

matic financial turnaround, contrary to the predictions of experts in late 1986. Consistent with this turnaround, and in contrast to LTV's earlier claim that it could not and would not fund the Plans, LTV had sought and obtained bankruptcy court approval to fund the new follow-on plans at a cost of at least $90 million per year. AR 643.[9] Finally, an LTV official had testified in the bankruptcy court that, with one exception, no facilities would be shut down in the next several years. AR 503-04, 644. The PBGC therefore no longer faced the imminent risk, central to its decision to terminate the Plans, of substantial additional unfunded liabilities for guaranteed shutdown benefits.

In September 1987, PBGC's internal working group recommended that the agency's Executive Director restore the Plans. AR 631. Before making a decision, the Executive Director consulted the PBGC's Board of Directors. After discussing the facts of the LTV case, and its historic opposition to abusive follow-on arrangements, the Board affirmed the authority of the Executive Director to determine when particular plans should be restored. AR 1582-84, Pet. App. 180a-81a.

Thereafter, the Executive Director offered to meet with LTV to "consider any additional information you might wish to supply." AR 1572. LTV and PBGC representatives then met on September 19 and 21, 1987. AR 1573, 1575. At these meetings, LTV expressed concern about the timing of any restoration decision, and, without offering any new information relevant to PBGC's decision, simply stated that the economic effect of restoration would be unclear, and that restoration would give rise to time-consuming litigation, casting doubt on the bankruptcy reorganization and imposing hardship on other creditors. AR 1575.

[9] It also had sought and obtained bankruptcy court approval to contribute approximately $90 million in cash and stock to a previously-established employee benefit program. AR 645.

The Executive Director issued a Notice of Restoration on September 22, 1987, based on LTV's establishment of abusive follow-on plans, its financial improvements, and its willingness to fund new pension arrangements. AR 1578, Pet. App. 181a. Restoration meant that the Plans were ongoing, and that LTV was again responsible for administering and funding them. When LTV refused to comply with the restoration, the PBGC brought an enforcement action in the United States District Court for the Southern District of New York on October 9, 1987. Pet. App. 51a-52a. Meanwhile, LTV filed an action in the bankruptcy court alleging that the restoration violated the automatic stay provision of the Bankruptcy Code in 11 U.S.C. § 362(a). Pet. App. 34a. After the district court granted the PBGC's motion to withdraw LTV's action from the bankruptcy court pursuant to 28 U.S.C. § 157(d), it considered both actions together. Pet. App. 34a. The court denied LTV's motion for enforcement of the automatic stay, but vacated the PBGC's restoration decision. Pet. App. 131a. On appeal, a panel of the United States Court of Appeals for the Second Circuit affirmed the district court's decision. Pet. App. 2a.

The Decision of the Court of Appeals

The court of appeals agreed with the district court that restoration is a governmental regulatory action, exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4). Pet. App. 24a. The court held, however, that the PBGC's decision to restore the Plans was arbitrary and capricious because the PBGC "focused inordinately on ERISA" and failed to honor the "policies and goals" of other laws. Pet. App. 17a.

In the alternative, and despite the broad grant of discretion in section 4047 of ERISA, the court held that the PBGC lacks statutory authority to restore pension plans on the basis of follow-on abuse because "[t]he legislative history of section 4047 reveals no indication that Con-

gress intended the establishment of successive benefit plans to be a ground for restoration." Pet. App. 17a.

Although the court agreed with the PBGC that "improvement in financial circumstances is a basis for restoration," Pet. App. 21a, it rejected the PBGC's financial standard and adopted one of its own. The PBGC based restoration on the fact that each of the financial factors that had necessitated termination had changed, and therefore plan termination and the payment of PBGC's guarantee was no longer justified. The court, however, decided that restoration for improved financial circumstances may be based only on "the long term ability of LTV to fund the Plans." Pet. App. 24a. Here, the court decided, "LTV's apparent ability to fund the Plans suffers" because "any claims arising out of LTV's obligation to pay into the pension fund plans are prepetition debts" that cannot be paid except in a proportional distribution with other general unsecured creditors pursuant to a plan of reorganization. Pet. App. 23a-24a.

Finally, the court held that the PBGC's decision, which was reached through informal adjudication, was arbitrary and capricious because the agency's procedures were inadequate. Pet. App. 26a.

Accordingly, the court affirmed the judgment of the district court, and remanded the case to the PBGC. Pet. App. 27a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW SERIOUSLY THREATENS THE FEDERAL PENSION INSURANCE PROGRAM.

The decision of the court of appeals invalidates a longstanding agency policy, allows LTV to shift $2 billion in pension liabilities to an already debt-laden federal insurance program, and requires a remand in which the PBGC, foreclosed from considering LTV's establishment of abusive follow-on plans, must apply an unreliable

financial standard and subordinate its statutory mandate to other interests. These rulings threaten to paralyze the agency's efforts to control abuses of the national pension insurance system. They afford financially troubled employers easy access to pension insurance funds while such employers continue to provide identical retirement benefits to their employees. If the decision of the court of appeals is not reversed, other companies will follow LTV's example and use pension insurance as a subsidy to reduce costs and gain a competitive edge. PBGC could then become an open-ended source of industry bailouts, unlegislated by Congress, with escalating costs to premium payers and ultimately workers. The result will be a fundamental transformation of the PBGC's role and a dramatic increase in the PBGC's liabilities that could lead to a financial crisis similar to that currently facing the FSLIC.

Many of the nation's private pension plans are substantially underfunded, often by hundreds of millions or, as in this case, billions of dollars.[10] The most severely underfunded plans generally are maintained by employers who are themselves in significant financial difficulty, and, often, in bankruptcy.[11] These plans present virtually the same financial risk to the agency as the

[10] Although Title I of ERISA and section 412 of the Internal Revenue Code impose statutory minimum funding requirements for pension plans, a plan can become seriously underfunded even if those requirements are fully met. For example, LTV was in full compliance with these minimum funding requirements until it filed for bankruptcy in July of 1986, yet its Plans were underfunded at that time by more than $2 billion.

[11] According to their 1988 annual reports, the pension plans of at least 17 large companies each have accumulated benefit obligations exceeding plan assets by more than $100 million. C. Vosti, *Funded Status Slipped in 1988*, Pensions & Investment Age 30-31 (July 24, 1989). The financial difficulties of several of these companies have been widely reported.

Plans in this case, and termination of even one of them would create a severe drain on the pension insurance program. This, in turn, would cause higher and higher premiums to be imposed on the plan sponsors that remain. In addition, because pension costs today constitute one of the most significant components of overall production costs, a company that continues to assume its pension burden, while other firms in its industry are obtaining a government subsidy, is at a significant competitive disadvantage. Faced with both competitive pressures and higher premiums, sponsors with well-funded plans will terminate their plans or convert them to defined contribution plans not covered by Title IV, leaving the pension insurance program with an even greater burden and a smaller base of healthy premium payers. Indeed, this is already occurring. *See* J. Chernoff, *Crushed by the Weight*, Pensions and Investment Age 1, 55 (September 4, 1989).

The decision here already has been relied upon by employers and unions in other cases before the agency or in litigation.[12] In the Wheeling-Pittsburgh Steel Corporation bankruptcy, for example, where PBGC has been

[12] Unions historically have opposed plan terminations because of the benefit losses that result from termination. These losses operate like coinsurance in the private sector, *see* R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989), where coinsurance is a common feature. As in the private sector, their purpose is "to discourage overutilization of services by the insured," thereby keeping the cost of insurance at a manageable level. C.A. Williams, Jr. and R. Heins, *Risk Management and Insurance* 484 (6th ed. 1989). *See also* J. Athearn, S.T. Pritchett, and J. Schmit, *Risk and Insurance* 321, 346 (6th ed. 1989). After the court of appeals' decision, however, unions can be expected readily to consent to termination if their members' benefits can be substantially recreated through follow-on plans. In that event, Title IV insurance will be used to subsidize collectively-bargained wages and benefits other than the pension benefits previously promised and now paid primarily by the PBGC. Thus, if follow-on plans are permissible, plan termination is advantageous for both employers and unions.

forced to assume plans with an aggregate deficiency of more than $497 million, Wheeling-Pittsburgh and the USWA are seeking a declaratory judgment that the post-termination implementation of follow-on plans negotiated in collective bargaining is permissible under Title IV. *USWA v. PBGC (In re Wheeling-Pittsburgh Steel Corp.)*, Bankr. No. 85-793, Civil No. 87-355 (W.D. Pa.). In papers filed on June 8, 1989, both plaintiffs argued that the LTV decision dispositively resolves the permissibility of follow-on plans under Title IV. The bankruptcy court, to which the district court had referred the case for recommended findings of fact and conclusions of law, agreed. *USWA v. PBGC, supra*, (Bankr. W.D. Pa. June 30, 1989). Quoting extensively from the LTV decision,[13] that court recommended that the district court approve implementation of the follow-on plans. The bankruptcy court further recommended that the district court enter a preliminary injunction allowing implementation of the follow-on plans pending a final decision on the merits. Five days later, on July 5, 1989, the district court issued a preliminary injunction permitting implementation of the follow-on plans enjoining PBGC from restoring the previously terminated plans.

In another case, the USWA is insisting, as a condition to agreeing to termination, that a company establish follow-on plans. Before the decision in this case, the PBGC believed that the parties would not pursue the matter, but now they are threatening the agency with litigation. Other similar cases are pending.[14]

[13] The bankruptcy court quoted verbatim fourteen paragraphs of the LTV opinion, describing it as "authoritative, directly on point, and so cleanly and clearly drafted that we have not the temerity to attempt an improvement." *Id.*, slip op. at 11 n.4.

[14] Some of these cases involve proposed terminations under the Title IV amendments effected by the 1987 Pension Protection Act. Thus, although extensive, those amendments plainly do not amelio-

Until the decision in this case, the PBGC's follow-on policy was an effective deterrent to abuse of the pension insurance program. After the agency first articulated its views on abusive follow-on plans in 1981, the president of the United Autoworkers Union ("UAW") recognized the financial threat to the agency posed by such plans. In a letter to the union's national staff (Pet. App. 184a), he advised UAW negotiators that follow-on plans were neither "desirable [n]or feasible," and urged them to consider instead such alternatives as funding waivers from the IRS or suits to enforce the employer's pension funding obligations under its collective bargaining agreement. Thereafter, the union actively pursued funding of the benefits promised its members. *See, e.g., International Union v. Keystone Consol. Indus.*, 793 F.2d 810 (7th Cir.), *cert. denied*, 479 U.S. 932 (1986).

Similarly, before PBGC's prompt and decisive response to LTV's abusive follow-on plans, Bethlehem Steel Corp., whose pension plans were then underfunded by over $2 billion, noted in an SEC filing dated September 15, 1987 that it was "carefully monitor[ing] the effects of filings by some of its competitors of petitions for reorganiza-

rate the risk that follow-on plans pose to the pension insurance program. For example, although PPA substantially tightened ERISA's statutory minimum funding requirements, it will be many years, if ever, before the amendments eliminate the huge underfunding that currently exists in a number of plans. PPA also increased the liability owed to the PBGC by employers who terminate underfunded plans to 100 percent of benefit liabilities. Even under PPA, however, as under the law in effect pre-PPA, much of PBGC's claim is typically a general unsecured claim under bankruptcy law, for which the PBGC generally recovers only a few cents on the dollar. And, although PPA imposes more stringent criteria that should make it more difficult for employers to terminate underfunded pension plans voluntarily, PBGC has no experience under the new law to indicate how it will be interpreted by the courts. Moreover, the risk that employers will, as in this case, take actions to compel an involuntary termination by PBGC, will continue in any event.

tion" in order to determine its own course of action.[15] In the wake of PBGC's restoration action, however, Bethlehem made additional contributions to its pension plans, greatly in excess of its statutory minimum funding obligation, reducing substantially the underfunding.

By eliminating this deterrent and requiring PBGC to subordinate its ERISA goals to perceived policies underlying other laws, the court's decision places the pension insurance program in serious financial jeopardy. Because this result is so dangerous for the workers and retirees protected by the program and so antithetical to the goals Congress expressed in ERISA, it must not be allowed to occur.

II. CONTRARY TO THIS COURT'S DECISIONS, THE COURT OF APPEALS MISAPPLIED FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW TO RESTRICT THE PBGC'S BROAD STATUTORY AUTHORITY.

A. In concluding that PBGC may not use its restoration authority to remedy abuse, the court of appeals ignored this Court's rulings on judicial review of agency interpretations and the use of legislative history.

In section 4047, Congress delegated to the PBGC exceedingly broad discretion to determine when terminated pension plans should be restored. Ignoring the plain statutory terms, however, the court of appeals relied on the *absence* of legislative history to conclude that the

[15] In this filing, the company stated: "[F]or a number of reasons, including the beneficial impact on costs of such competitors as a result of these [Chapter 11] filings and the potential improvement of Bethlehem's overall competitiveness through the possible reduction of certain of its contractual, *pension*, social insurance and other financial obligations, Bethlehem has studied the relief and protection that might be available to it under Chapter 11." Preliminary Prospectus of Bethlehem Steel Corp. dated September 15, 1987 for 12,000,000 shares of Common Stock (emphasis added).

PBGC may not base restoration on the establishment of abusive follow-on plans.

The court's analysis conflicts with the standard of review this Court established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which a court must accept an agency's interpretation of its governing statute unless the interpretation is explicitly *foreclosed* by a clearly expressed legislative intent or is unreasonable. Here, far from foreclosing PBGC's interpretation, the legislative history explicitly confirms the breadth of the agency's discretionary authority. The 1974 legislative history states that the PBGC may restore a pension plan where "the employer and plan enjoy[] a favorable reversal of business trends, *or if some other factor ma[k]e[s] termination no longer advisable.*" H.R. Conf. Rep. No. 1280, 93d Cong., 2d. Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58 (emphasis added). The legislative history to the 1986 amendments to section 4047 states that restoration is appropriate to block abuses of the pension insurance program. 132 Cong. Rec. 4887 (1986) (statement of Sen. Nickles).[16]

[16] The court of appeals, however, relied on the fact that "the legislative history of SEPPAA bears no indication that Congress considered the establishment of follow-on plans subsequent to an involuntary termination to be a ground for restoration." Pet. App. 18a. The court, moreover, agreed with the district court that the opinion letters setting forth the PBGC's policy against abusive follow-on plans were "too factually dissimilar from the instant case to be of substantial assistance here" because the opinion letters all involve voluntary rather than involuntary terminations. Pet. App. 20a. However, in this case and any other case where an employer attempts to establish post-termination abusive follow-on plans, the voluntary/involuntary distinction has no legal or practical basis. Because one of PBGC's duties is to limit the transfer of unfunded pension liabilities onto the single-employer pension insurance program to "cases of severe hardship," SEPPAA § 11002 (c)(4), 29 U.S.C. § 1001b(b) (Supp. IV 1986), it exercises its discretionary authority to terminate pension plans involuntarily

Ignoring the statute, the court of appeals focused on the one example mentioned in the legislative history—a favorable reversal of business trends—and concluded that restoration should be used only for that purpose. However, under *Chevron*, the lack of an express congressional intent to foreclose PBGC's authority means that the court is required to defer to the agency's interpretation of section 4047 so long as the follow-on policy is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see Mead Corp. v. Tilley*, 109 S. Ct. 2156, 2161-62 (1989) (*Chevron* principles applied to PBGC's interpretation of Title IV of ERISA). Given the broad language of Section 4047 and the PBGC's need to protect the pension insurance program from follow-on abuse, *see supra* at 13-14, it clearly was. Instead of examining that question, the court impermissibly used its foray into the legislative history as a vehicle for substituting its judgment for the broad discretion of the PBGC.

Compounding its error, the court went on to focus on Congress's failure to pass subsequently proposed legislation that would have prohibited the establishment of *any* new retirement arrangement, whether or not abusive, following plan termination. H.R. 3545, 100th Cong., 1st Sess. § 9511(e) (1987). Recognizing that this congressional inaction was "not applicable to the instant case," the court nevertheless relied on it to find a "continuing consensus not to include the establishment of follow-ons as a basis for a restoration decision." Pet. App. 18a. In doing so, the court far departed from traditional tools of statutory construction. *See Chevron*, 467 U.S. at 843 n.9. This Court's decisions make clear, for example, that subsequent legislative history is at best a "hazardous basis"

only when the risk to participants and the insurance program leave it no other choice. In most cases, it is actions of the employer that give rise to that situation. Here, for example, LTV did everything it could to impel PBGC to terminate the Plans involuntarily. *See supra* at 7-8.

for inferring the intent of an earlier Congress. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304 (1960)). Further, congressional *inaction* "has no persuasive significance," as "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change." *United States v. Wise*, 370 U.S. 405, 411 (1962).

This misuse of legislative history and substitution of judgment led to vastly more than a technical legal error. As discussed in Section I, *supra*, the lower court's invalidation of the PBGC's policy against follow-on plans leaves the agency virtually powerless to safeguard public funds for use in cases of genuine need.[17]

B. A court may not substitute its judgment for PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances.

The court below also substituted its judgment for the PBGC's regarding the second factor that the agency determined supported restoration of LTV's pension plans: the company's improved financial circumstances. The court replaced the agency's financial standard—whether the financial conditions necessitating termination continued to exist—with its own, and, in doing so, made restoration of any pension plan a virtual impossibility.

Although the court recognized that "improvement in financial circumstances is a basis for restoration," and conceded that "ERISA contains no standard" for judging the *degree* of financial improvement necessary to sustain a restoration decision, Pet. App. 21a, it scrutinized every detail of the PBGC's financial analysis, then rejected it in favor of its own. Misunderstanding the basis for PBGC's decision, the court concluded that restoration for improved financial circumstances may be based only on the "long term ability" of a company to fund its plan. Pet. App. 22a, 24a.[18]

This judicial overreaching interfered with precisely "the type of judgment which administrative agencies are best equipped to make and which justifies the use of

[17] The court of appeals also concluded that the administrative record did not support a finding that LTV's follow-on plans were "merely continuations of the old Plans." Pet. App. 19a. Again, the court did not apply the proper standard of review. The record contained the plans themselves, AR 230-303, and the affidavit of the agency's actuarial expert that these plans provide substantially the same benefits. AR 219. LTV did not choose to cross-examine the agency's expert for further explanation. AR 610. Indeed, as the district court found, LTV and the union "do not dispute that the 1987 [collective bargaining agreement] substantially achieved th[e] goal" of "the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated." Pet. App. 109a.

[18] The court of appeals compounded this error by concluding, contrary to the PBGC's analysis, that any amounts owed to a pension plan are pre-petition debts, not entitled to priority under bankruptcy law. Pet. App. 23a. This conclusion, however, is incorrect and contrary to existing case law. *E.g.*, *In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983); *Columbia Packing Co. v. PBGC*, 81 Bankr. 205 (D. Mass. 1988); *PBGC v. The Washington Group Inc.*, 8 Empl. Ben. Cas. (BNA) 1351 (M.D.N.C. 1987), *modified*, No. C-86-665-G, 1987 U.S. Dist. Lexis 5655 (M.D. N.C. May 29, 1987), *appeal dismissed*, Nos. 87-3079, 87-3129 (4th Cir. Jan. 10, 1989). If it is followed, employers in bankruptcy will generally be precluded by bankruptcy law from making the periodic contributions to their pension plans that ERISA requires. As a result, some plans that would otherwise continue will have to be terminated, because their assets will be depleted. Moreover, when a plan does terminate, the PBGC, which has always asserted priority status for at least a portion of its claims, will become merely a general unsecured creditor, entitled to share only in whatever value, if any, is left over after secured and priority creditors are paid. Thus, under the court of appeals' conclusion, termination is even less expensive than it otherwise would be, and the incentive to terminate increases accordingly.

the administrative process." *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). The PBGC has been analyzing the financial condition of plans and employers since the agency's inception in 1974, and has determined through this experience that the kind of long-term predictions required by the lower court's decision simply cannot be made on a reliable basis. This became readily apparent when Congress was considering, and the PBGC studying, a risk-based premium. In a report prepared for Congress in 1987 after numerous in-depth studies, the PBGC determined, and its outside experts concurred, that predicting when the pension plans of particular companies will terminate is "essentially impossible." PBGC, *Promises at Risk* at 44, *reprinted in PBGC Proposal to Initiate a Variable Rate Premium System*, etc.: *Hearings Before the Subcomm. on Oversight of the House Committee on Ways and Means*, 100th Cong., 1st Sess. 52 (1987) (attachment to Statement of PBGC Executive Director Kathleen P. Utgoff). One of the PBGC's outside experts noted specifically "how hard it is to judge the ultimate ability of a troubled firm to survive." *Id.* at 43. For this reason, the PBGC recommended against a pension insurance premium based upon a company's ability to fund its plans. *See id.* at 49-57. Congress agreed.

In fact, the instant case demonstrates the inherent unreliability of long-term predictions of this type. Steel industry experts widely agreed in late 1986 that the industry would continue its then-prevalent downward trend. *See, e.g.*, Oppenheimer & Co., Inc., *Steel—Appropriate Methods of Demand Forecasting* (Nov. 1986), available on NEXIS, Company library, Ind. file. Almost uniformly, they failed to predict the dramatic improvements in the industry that began just a few months later, in early 1987. The PBGC's conclusion here thus "rest[ed] squarely in that area where administrative judgments are entitled to the greatest amount of

weight by appellate courts," and should not have been disturbed. *Chenery*, 332 U.S. at 209; *see Batterton v. Francis*, 432 U.S. 416, 426 (1980).[19]

Here too, the lower court's overreaching has significant practical, as well as legal consequences. Just as the PBGC would not have been able to prove with any degree of reliability LTV's "long-term" ability to fund the pension plans in this case, it will be unable to do so in other cases, particularly in cyclical and volatile industries like steel. The court's imposition of its own standard thus drastically curtails—and perhaps eliminates—the PBGC's ability to restore pension plans, in spite of the statutory language directing it to do so when it considers restoration to be appropriate and consistent with its duties. *See* 29 U.S.C. § 1347.

C. Federal agencies are not required to subordinate their policy goals to inchoate policies underlying other laws.

Under the guise of determining whether PBGC had taken all relevant factors into consideration in arriving at its decision, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the court of appeals also rejected PBGC's decision because the agency did not subordinate its broad and specific authority under section 4047 to inchoate policies under the bankruptcy and labor laws. Pet. App. 14a-17a, 18a, 23a-24a. It concluded that the spirit of those laws foreclosed the

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[19] The authorities the court of appeals cited for imposing its own, long-term ability to fund standard (Pet. App. 24a-25a) are entirely inapposite. The prohibition in Title I of ERISA on "pay-as-you-go" funding does not relate to the duration of a plan's existence, but simply reflects Congress's concern that plans be reasonably funded for so long as they in fact exist. The provision of the Internal Revenue Code requiring plans to be "permanent" merely reflects the policy concern that employers not be able to maintain a plan only for so long as it is advantageous for tax purposes.

exercise of PBGC's express enforcement authority under section 4047.

The court of appeals' departure from traditional rules of analysis, which require a court to begin with the plain language of a statute, is fundamental and far-reaching. Section 4047 of ERISA grants the PBGC broad authority and discretion to restore previously terminated pension plans "in any . . . case in which the corporation determines such action to be appropriate and consistent with its duties under this title [IV]." 29 U.S.C. § 1347. Thus, "the intent of Congress is clear," and that should have been "the end of the matter." *Chevron*, 467 U.S. at 842-43.[20] Ignoring *Chevron* and Congress's broad delegation of authority, however, the court relied on bankruptcy and labor law policies to substitute its judgment for that of the agency.[21]

This Court has recognized that the Bankruptcy Code does not give a debtor "*carte blanche* to ignore nonbankruptcy law." *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986). Indeed, "[i]f Congress wishes to grant the

[20] As this Court has made clear, an agency's authority is limited to the area Congress entrusts it to regulate. *See Community Television of S. Calif. v. Gottfried*, 459 U.S. 498, 509-11 & n.17 (1983) (because the FCC's duties "derive from the Communications Act, not from other federal statutes," it is not responsible for enforcing the Rehabilitation Act); *NAACP v. FPC*, 425 U.S. 662, 670-71 & n.7 (1976) (Federal Power Commission's general duty to enforce the public interest does not require it to assume responsibility for enforcing legislation that is not directed at the agency).

[21] The court attempted to justify its holding by referring to ERISA § 514(d), 29 U.S.C. § 1144(d), which provides that "[n]othing in this title [Title I of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." Pet. App. 16a. However, the plain language of this section limits its applicability to Title I of ERISA, and there is no comparable provision in Title IV, which the PBGC is charged with enforcing.

trustee an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'" *Id.* at 501 (quoting *Swarts v. Hammer*, 194 U.S. 441, 444 (1904)). No such intent has been expressed here, either explicitly or implicitly. To the contrary, as the court of appeals itself recognized, Congress has granted regulatory enforcement actions like restoration an explicit exemption from bankruptcy law. Pet. App. 24a (agreeing with the district court that PBGC's action was exempt from the automatic stay in bankruptcy pursuant to 11 U.S.C. § 362(b)(4)). Similarly, this Court has refused to permit the interests underlying collective bargaining agreements to override federal law or policy. *See UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

Moreover, Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws, making it unnecessary—and inappropriate—for PBGC or the court of appeals to balance the spirit of other laws.[22] For example, a plan sponsor in bankruptcy reorganization may be able to terminate a pension plan voluntarily if it can demonstrate to the bankruptcy court that the company will not otherwise be able to reorganize. *See* 29 U.S.C. § 1341(c)(2)(B)(ii). The legislative history of Title IV makes clear that Congress considered bankruptcy policies in fashioning this test.[23] Congress also

[22] This is not a case where judicial intervention is necessary to reconcile a direct statutory conflict, *see, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (NLRB's enforcement of NLRA "would run directly counter to the express provisions of the Bankruptcy Code"), or to correct agency action that "trench[es] upon the . . . jurisdiction" of another agency. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962).

[23] "[T]he [House Education and Labor] Committee tried to balance the need to limit access to the insurance system to cases of genuine need against the danger of making the tests so stringent

specifically integrated labor law concerns by providing, in 29 U.S.C. § 1341(a)(3), that an employer may not terminate a pension plan voluntarily "if the termination would violate the terms and conditions of an existing collective bargaining agreement." *Id.*

Disregarding the efforts of the legislative branch, the court of appeals took it upon itself to balance bankruptcy and labor law policies against the plain language of section 4047. In doing so, the court has created significant practical difficulties for the PBGC and the multitude of other agencies that regulate companies which may be in bankruptcy or subject to collective bargaining requirements. Certainly, the enforcement authority of PBGC and other agencies may be affected by the court's creation of a safe harbor for otherwise impermissible actions that are the product of collective bargaining. Even more significant, however, is the notion that federal regulatory programs should be subordinated to a debtor's interest in reorganizing. The PBGC, for example, has a docket of more than 600 active bankruptcy cases, and is frequently faced with claims that Title IV should give way in the interests of facilitating a debtor's reorganization.[24] If permitted to stand, the court of appeals' decision will adversely affect the agency's ability to resist such claims. Other agencies dealing regularly with bankrupt employers may also be affected.

Finally, underlying the court of appeals' opinion is a doctrinal error with implications that are profound for the legal system as a whole—the supposition that a court

that nothing short of total liquidation would qualify for PBGC assistance." H.R. Rep. No. 241, 99th Cong., 1st Sess., pt. 2, at 49 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 707.

[24] For example, in an effort to reduce their liability to both plan participants and the PBGC, bankrupt companies sometimes argue that the Bankruptcy Code provision governing the rejection of executory contracts, 11 U.S.C. § 365, supersedes the provisions of Title IV, 29 U.S.C. §§ 1341, 1342, that govern the manner in which a pension plan may be terminated.

can derive a single controlling goal from statutes as complex as the Bankruptcy Code and the National Labor Relations Act. Both of these statutory schemes reflect a careful and deliberate effort by Congress to balance a multitude of conflicting interests. In the Bankruptcy Code, for example, Congress balanced the interests of debtors in being shielded from financial pressures with the interests of government agencies in enforcing their laws. *See* 11 U.S.C. § 362(a), (b)(4). Similarly, in the National Labor Relations Act, Congress balanced the interests of employers and unions in maintaining industrial peace through collective bargaining with, for example, the interests of society as a whole in preventing unreasonable restraints on trade. *See* 29 U.S.C. § 158(e). Without analysis, the court of appeals simply accepted one characterization of the purposes of these statutes and required PBGC to do likewise. Federal agencies will never be able to accomplish their statutory mandates if they are required to divine the underlying purposes of other statutory schemes and then give them unspecified weight in administering their own organic statutes. This aspect of the decision below alone warrants review.

D. A court may not impose on an agency procedural requirements not mandated by the due process clause, the agency's governing statute, or the Administrative Procedure Act.

In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), this Court made clear that where the due process clause is not implicated and an agency's governing statute contains no specific procedural mandates, the Administrative Procedure Act establishes the maximum procedural requirements a reviewing court can impose on agency rule-making. 435 U.S. at 524. As the Court stated, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."

Id. Thus, this Court "has for more than four decades emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Id.*

The PBGC properly exercised that discretion in this case. Its procedures, while informal, were thorough and fair. As discussed above, the PBGC made no secret of its objections to LTV's follow-on plans and repeatedly gave LTV the opportunity to present its side of the dispute or work out other arrangements. LTV, a sophisticated corporate entity that relied on numerous counsel, including special ERISA counsel, in all of its dealings with the PBGC, was in no way surprised or prejudiced by these procedures. In these circumstances, and particularly in light of the PBGC's need for prompt action to correct abuse of the pension insurance program and prevent other companies from following LTV's example, the court erred in rejecting the agency's procedures and imposing on PBGC's restoration authority procedural requirements approximating those prescribed for formal adjudication.

This case presents the question, not yet specifically addressed by this Court, whether the principles of *Vermont Yankee* apply to informal adjudications like the PBGC's action in this case. As the lower courts recognized, the PBGC is entitled to proceed by informal adjudication in reaching a restoration decision under section 4047. Pet. App. 26a, 120a. The APA does not impose any procedural requirements applicable to the informal adjudication in this case. Moreover, as the court of appeals acknowledged, section 4047 "does not discuss the procedures that are to be followed by PBGC when reaching a restoration decision." Pet. App. 26a. Finally, no protected liberty or property right was implicated by the restoration decision; none was asserted by LTV and none was identified by the court.

As this Court emphasized in *SEC v. Chenery Corp.*, imposing "rigid [procedural] requirement[s] . . . would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." 332 U.S. at 202. Moreover, "if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the 'best' or 'correct' result, judicial review w[ill] be totally unpredictable," and agencies will feel compelled to adopt full adjudicatory procedures in every instance in order to avoid reversal. *Vermont Yankee*, 435 U.S. at 546-47. This is precisely the effect of the decision below.

By failing to apply this Court's teachings in *Vermont Yankee* and imposing its own notion of the procedures required to ensure "fundamental fairness," the lower court has made judicial review, at least in that circuit, completely unpredictable. Plainly, the court's imposition of specific procedures raises the same concern with judicial encroachment upon congressionally-delegated agency discretion that underlay *Vermont Yankee*. The court below, moreover, is not alone in disregarding *Vermont Yankee*'s general principles. *See, e.g., American Trading Transportation Co., Inc. v. U.S.*, 841 F.2d 421, 425 (D.C. Cir. 1988) (specifying particular procedures required for informal adjudication); *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982) (same, characterizing *Vermont Yankee*'s prohibition on court-required procedural devices as "dictum"); *but see Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338-39 (D.C. Cir. 1989) (while precise holding of *Vermont Yankee* is inapplicable to informal adjudication, its general principles "would simply forbid" reviewing court from imposing upon the agency specific procedural steps that must be followed in order to create a reviewable record). If this trend is permitted to continue, agencies may well seek to protect their decisions by implementing

procedures more appropriate to judicial proceedings, thereby "stultify[ing] the administrative process." *Chenery*, 332 U.S. at 202.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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89-390 (2)

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
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Nos. 695,696 August Term, 1988

(Argued January 13, 1989 Decided May 12, 1989)

Docket Nos. 88-6244, 88-6246, 88-6252

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff-Appellant,
Cross-Appellee,

DAVID H. MILLER and WILLIAM W. SHAFFER,
Intervenors-Appellants,

v.

THE LTV CORPORATION and LTV STEEL COMPANY, INC.,
Defendants-Appellees,

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK and CITIBANK, N.A.,
Intervenors-Appellees,

THE LTV BANK GROUP,
Intervenor-Appellee,
Cross-Appellant.[1]

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[1] The LTV Bank Group filed a Notice of Cross-Appeal from the final judgment of the United States District Court for the South-

Before: VAN GRAAFEILAND, MESKILL and MINER, *Circuit Judges.*

Appeal from a final judgment of the United States District Court for the Southern District of New York, Sweet, *J.*, that denied plaintiff Pension Benefit Guaranty Corporation's (PBGC) motion for summary judgment, vacated PBGC's Notice of Restoration of certain pension plans, and entered judgment in favor of defendants The LTV Corporation and LTV Steel Company, Inc.

Affirmed.

GARY M. FORD, General Counsel, Pension Benefit Guaranty Corp., Washington, D.C. (Carol Connor Flowe, Deputy General Counsel, Jeanne K. Beck, Assistant General Counsel, James J. Armbruster, Paula J. Connelly, Pension Benefit Guaranty Corp., Washington, D.C., Philip W. Tone, Jenner & Block, Washington, D.C., E. Calvin Golumbic, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., of counsel), *for Appellant Pension Benefit Guaranty Corp.*

R.A. KING, Pittsburgh, PA (Kenneth R. Bruce, Janet R. Thompson, Buchanan Ingersoll, Pittsburgh, PA, Stuart Cotton, Mound Cotton & Wollan, New York City, of counsel), *for Appellants David H. Miller and William W. Shaffer.*

LEWIS B. KADEN, New York City (Karen E. Wagner, Sharon Katz, Joan Greco, Davis Polk & Wardwell, of counsel), *for Appellees LTV Corp. and LTV Steel Co., Inc.*

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ern District of New York. It did not file a separate brief in support of this cross-appeal, but rather joined in a brief filed on behalf of the LTV Corporation, LTV Steel Company, Inc. and the Official Committee of Unsecured Creditors of the LTV Corporation. Its position appears to be indistinguishable from the other parties' claims. There being no separate brief filed, we consider its cross-appeal to have been abandoned.

MICHAEL J. CRAMES, New York City (Herbert S. Edelman, Marc Abrams, Levin & Weintraub & Crames, New York City, of counsel), *for Appellees LTV Corp. and LTV Steel Co., Inc.*

Frank Cummings, Leboeuf, Lamb, Leiby & Macrae, Washington, D.C., *on the brief, for Appellees LTV Corp. and LTV Steel Co., Inc.*

BRIAN COGAN, New York City (Lawrence M. Handelsman, Stroock & Stroock & Lavan, New York City, Leonard E.M. Rosen, Theodore Gewertz, Harold Novikoff, Wachtell, Lipton, Rosen & Katz, New York City, of counsel), *for Appellee Official Committee of Unsecured Creditors.*

GEOFFREY M. KALMUS, New York City (Joel Zweibel, Peter V. Pantaleo, Kramer, Levin, Nessen, Kamin & Frankel, New York City, of counsel), *for Appellee LTV Bank Group.*

CLAUDE D. MONTGOMERY, New York City (Edgar H. Booth, Peter D. Wolfson, Sara L. Chenetz, Myerson & Kuhn, New York City, of counsel), *for Appellee Official Committee of Equity Security Holders.*

KATHRYN C. MALLORY, Dallas, TX (Robin E. Phelan, Haynes and Boone, Dallas, TX, of counsel), *for Appellee BancTexas Dallas, N.A.*

Carl B. Frankel, Paul V. Whitehead, Karin S. Feldman, United Steelworkers of America, Pittsburgh, PA, Bruce H. Simon, Richard M. Seltzer, Babette A. Ceccotti, Sophia E. Davis, Cohen, Weiss and Simon, New York City, *on the brief, for Amicus Curiae United Steelworkers of America.*

G. Stewart Webb, Jr., William D. Quarles, Warren W. Hamel, Venable, Baetjer, Howard and Civiletti, Washington, D.C., *on the brief, for Amici Curiae Armco, Bethlehem Steel Corp., Inland Steel Industries, Inc., National Steel Corp. and USX Corp.*

MESKILL, *Circuit Judge*:

This is an appeal from a September 12, 1988 judgment of the United States District Court for the Southern District of New York, Sweet, *J.*, that denied a motion for summary judgment by plaintiff Pension Benefit Guaranty Corporation (PBGC), vacated PBGC's Notice of Restoration of several pension plans that were maintained and administered by defendants The LTV Corporation and LTV Steel Company, Inc. and ordered entry of judgment in favor of LTV. The district court's opinion is reported as *In re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988).

We affirm the judgment of the district court and remand the matter to PBGC.

BACKGROUND

A. *PBGC and Title IV of ERISA*

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1982 & Supp. IV 1986), *as amended by* the Single-Employer Pension Plan Amendments Act of 1986 (SEPPAA), Pub. L. No. 99-272, 100 Stat. 237,[2] governs the maintenance and administration of employee pension plans. PBGC is a wholly owned United States government corporation which serves as a national insurer of pension plans. It was created under ERISA section 4002, 29 U.S.C. § 1302, "(1) to encourage the continuation and maintenance of voluntary private pension plans . . ., (2) to provide for the timely and uninterrupted payment of pension benefits to [plan] participants and beneficiaries . . ., and (3) to maintain premiums established by the corporation . . . at the lowest level consistent with carrying out its obligations."

[2] Certain sections of ERISA relevant to this appeal were further amended by the Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 9301-9346, 101 Stat. 1330, 1330-331 - 1330-374 (codified as amended at 29 U.S.C.A. §§ 1001-1461 (1985 & West Supp. 1988)). These amendments took effect after the events relevant here, and therefore are inapplicable.

Under ERISA, single-employer pension plans may be voluntarily terminated under certain circumstances by plan administrators under ERISA section 4041, 29 U.S.C. § 1341. They also may be involuntarily terminated by PBGC under ERISA section 4042, 29 U.S.C. § 1342, for various reasons such as the employer's inability to adequately fund the benefit programs. PBGC is required to guarantee payment of non-forfeitable benefits under terminated plans, subject to certain limitations. *See* ERISA sections 4022, 4022B, 4061, 29 U.S.C. §§ 1322, 1322b, 1361. To finance the payment of these benefits, PBGC uses funding obtained from two sources: (1) the annual insurance premiums paid by the administrators of covered plans pursuant to sections 4006 and 4007 of ERISA, 29 U.S.C. §§ 1306, 1307, and (2) the employer liability payments collected under section 4062 of ERISA, 29 U.S.C. § 1362, which makes employers whose plans terminate with insufficient assets liable to PBGC for part of the terminated plan's unfunded guaranteed benefits, *see* 29 U.S.C. § 1362(b).

Section 4047 of ERISA, 29 U.S.C. § 1347, provides for the restoration of plans that have been terminated. Specifically, section 4047 provides, in pertinent part:

> In the case of a plan which has been terminated under section 1341 or 1342 of this title [PBGC] is authorized in any such case in which [PBGC] determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

Whether PBGC properly exercised this restoration authority is the focal point of the instant dispute.

B. *LTV and Its Financial Difficulty*

The LTV Corporation is a Delaware corporation whose subsidiaries include LTV Steel Company, Inc.; which was created by the merger of the Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation. LTV Corporation and LTV Steel Company, Inc. will hereinafter be referred to collectively as "LTV." LTV maintained numerous pension benefit plans for its employees, including the three plans that are the subject of the instant dispute, the Jones & Laughlin Hourly Pension Plan (J&L Hourly Plan), the Jones & Laughlin Retirement Plan (J&L Salaried Plan), and the Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Republic Hourly Plan) (collectively "the Plans"). The Plans were subject to the minimum funding standards found in section 302 of ERISA, 29 U.S.C. § 1082, and section 412 of the Internal Revenue Code, 26 U.S.C. § 412 (1982) (amended 1986), both of which required LTV to make contributions to them.

When LTV began experiencing financial difficulty in 1985, it applied for and received from the Internal Revenue Service (IRS) a waiver of its minimum funding requirement for the 1984 plan year pursuant to section 412(d) of the Internal Revenue Code, 26 U.S.C. § 412(d). According to the terms of the waiver, LTV was permitted to amortize over a fifteen year period the 1984 contribution due under the plans. In 1986, LTV, still experiencing financial difficulty, sought waivers of the amount it owed for the 1985 plan year and the amount due under the amortization agreement for the 1984 plan year. In November 1986, the IRS denied the request and revoked LTV's waiver of the 1984 payment obligation, making LTV immediately liable for the contributions for the two years.

On July 17, 1986, LTV and most of its subsidiaries filed petitions for reorganization under Chapter 11 of the

Bankruptcy Code, 11 U.S.C. §§ 1101-1174 (1982 & Supp. V 1987). On December 16, 1986, LTV sent a letter to PBGC stating that "because LTV is currently in reorganization under Chapter 11 of the Bankruptcy Code, LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies arising upon the denial of the funding waivers," and also that "LTV does not intend, and is not likely to have the ability, to fund the Plans for future years."

C. *PBGC's Involuntary Termination of the Plans*

On January 12, 1987, PBGC brought an action under section 4042 of ERISA, 29 U.S.C. § 1342, to terminate the Plans and to be appointed statutory trustee. LTV agreed to the terminations and the United States District Court for the Southern District of New York, Owen, J., entered consent orders terminating the Plans as of January 13, 1987. The United Steelworkers of America (the Union) filed an unsuccessful motion to vacate the consent orders. We affirmed the district court's order denying that motion. *Jones & Laughlin Hourly Pension Plan* v. *LTV Corp.*, 824 F.2d 197 (2d Cir. 1987). Pursuant to the consent orders and the guarantee found in ERISA section 4022, 29 U.S.C. § 1322, PBGC became liable for funding the payment of the non-forfeitable benefits under the Plans. Payment of benefits was reduced to the extent they were not guaranteed by PBGC. Benefits not guaranteed by PGBC, such as certain early retirement, disability and surviving spouse benefits were lost completely as a result of the termination.

D. *The Union Lawsuit and the 1967 Collective Bargaining Agreement*

The Union is the representative of LTV's non-management employees. The Union brought suit in bankruptcy court alleging that LTV's failure to provide the full range of benefits specified under the Plans amounted

to a breach of the existing collective bargaining agreement between the Union and LTV and was a violation of section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113 (which allows rejection of collective bargaining agreements by debtors-in-possession in bankruptcy only under certain circumstances). Fearing that the Union would strike to obtain payment of the non-guaranteed benefits and hoping to settle the lawsuit, LTV sought and obtained approval from the bankruptcy court to make a single hardship payment to each retiree.

The Union and LTV subsequently entered into negotiations that resulted in a new collective bargaining agreement (the 1987 CBA). The 1987 CBA, which settled the Union's suit against LTV, is an interim agreement that is to remain in effect until confirmation of a plan of reorganization. Under the 1987 CBA, some of the benefits that employees had enjoyed under the previous collective bargaining agreement were reinstated with modifications, and several new benefit programs were included. These modified and new plans will be referred to as either the "new Plans" or the "1987 CBA Plans." PBGC contends that the 1987 CBA Plans were "follow-ons" or merely continuations of the Plans, and allowed LTV to provide a high level of benefits to its employees while a substantial portion of the cost of the programs was paid by PBGC. The bankruptcy court approved the 1987 CBA, pursuant to an exercise of its powers under 28 U.S.C. § 157(b) (1982 & Supp. IV 1986) and section 105 of the Bankruptcy Code, 11 U.S.C. § 105. PBGC strongly objected to the bankruptcy court's approval.

E. *Restoration of the Plans*

On August 12, 1987, the SEPPAA Trusteeship Working Group (the Working Group), a PBGC committee established to advise PBGC, unanimously recommended restoration of the Plans to avoid abuse of the pension termination insurance program. The recommendation was based on:

a. LTV's establishment of abusive follow-on plans which, together with the PBGC's guarantee, provide substantially the same benefits as the terminated plans and restore amounts in excess of PBGC's guarantee limitations;

b. the improvement in LTV's financial condition; and

c. LTV's demonstrated willingness to fund employee retirement plans.

According to the minutes of the August 6, 1987 meeting held to consider restoration, the Working Group "discussed the purposes of Title IV of ERISA, PBGC's duties and obligations under Title IV and SEPPAA's Declaration of Policy" before reaching it recommendation.

The Working Group's recommendation was reviewed by the Executive Director of PBGC who concurred in the reasoning and the result. On September 22, 1987, PBGC issued a Notice of Restoration stating that pursuant to ERISA section 4047, 29 U.S.C. § 1347, it was appropriate for PBGC to restore full liability for the Plans to LTV. Restoration was effective as of January 13, 1987.

F. *District Court Proceedings*

When LTV refused to comply with the Notice of Restoration, PBGC brought an enforcement action in district court. David H. Miller and William W. Shaffer, former salaried employees of LTV companies who were entitled to benefits pursuant to the J&L Salaried Plan, intervened individually and on behalf of others seeking to have the Notice of Restoration enforced at least with respect to the J&L Salaried Plan. The Official Committee of Unsecured Creditors of LTV Corporation, the Subcommittee of Parent Creditors of the Official Committee of Unsecured Creditors of LTV Corporation, the LTV Bank Group, the Official Committee of Equity Security Holders, BancTexas Dallas, N.A., the Fifth Third Bank, Hunting-

ton National Bank and Citibank, N.A. all intervened seeking to have PBGC's restoration decision vacated. PBGC subsequently moved for summary judgment on all of its claims. The district court denied the motion and found that the bases for the restoration decision were not supported by the administrative record, that PBGC's conclusion was reached in an arbitrary and capricious manner, that PBGC's procedures were inadequate and that the appropriate remedy was to vacate the Notice of Restoration and remand the matter to PBGC. The appeal followed. For the following reasons, we agree with the district court's disposition of this case.

DISCUSSION

A. *Jurisdiction*

In rendering its judgment, the district court stated that it "determined pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay" and went on to deny PBGC's motion for summary judgment, vacate PBGC's Notice of Restoration and direct entry of judgment in favor of LTV. Intervenor-appellee BancTexas Dallas, N.A. contends that the Rule 54(b) certification was improvidently granted and thus we lack appellate jurisdiction because there was no final judgment capable of being appealed.

The grant of Rule 54(b) certification is reviewable on appeal under an abuse of discretion standard. If the district court abused its discretion in issuing the certification, we lack jurisdiction over this appeal. *Burr by Burr* v. *Ambach*, 863 F.2d 1071, 1074 (2d Cir. 1988) (citing *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956), *Brunswick Corp.* v. *Sheridan*, 582 F.2d 175, 183 (2d Cir. 1978)). The district court did not strictly comply with the requirements for the issuance of a Rule 54(b) certification in this case. Nevertheless, we conclude that we do have appellate jurisdiction to adjudicate the merits of this case.

Rule 54(b) states, in pertinent part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Unquestionably, there are several claims and multiple parties involved in the instant dispute. At issue here is whether all of the claims were specifically addressed by the district court, and, if not, whether the Rule 54(b) certification was properly granted.

BancTexas claims that the district court did not adjudicate all of the claims of intervenors-appellants Miller and Shaffer or of intervenor-appellee the Official Committee of Equity Security Holders (Equity Committee). Specifically, BancTexas argues that the district court neglected to address Miller's and Shaffer's request "that the Court decree that the J&L Plan is to pay full promised plan benefits with interest to each retired participant, both retroactively to January 13, 1987 and in the future as those benefit payments come due from the assets of the J&L Plan." BancTexas also contends that the district court failed to address the Equity Committee's request that the court enter judgment

> (1) On the First Claim against LTV and LTV Steel, declaring the consents of LTV and LTV Steel to the Terminations to have been unnecessary and in violation of Section 363 of the Bankruptcy Code (which regulates the trustee's use, sale or lease of property of an entity in bankruptcy and the rights of third parties that have an interest in that property) and Bankruptcy Rule 9019 (which concerns compromise and arbitration of controversies affecting

the bankruptcy estate); and requiring LTV and LTV Steel to consent to and comply with the Restorations on economically viable terms;

(2) On the Second Claim against LTV and LTV Steel and Cross-Claim against PBGC, declaring pursuant to 28 U.S.C. Sections 2201 and 2202, 11 U.S.C. Section 105 and 29 U.S.C. Section 4047 that the PBGC has the power and authority to restore the Plans; that such restoration must be on terms and conditions that are economically viable, in a manner not inconsistent with ERISA and not contrary to the provisions of the Bankruptcy Code; . . . and

(3) On the Third Claim against LTV Steel, declaring that if assets or securities of any Debtor other that LTV Steel are to be used to satisfy any claims in the Debtors' jointly-administered reorganization cases caused by or arising from the Terminations, such Debtors shall have claim against LTV Steel for the full value of any of its assets or securities used to satisfy such a claim.

In effect, Miller's and Shaffer's complaint sought the enforcement of PBGC's reinstatement decision. The district court's decision vacating the Notice of Restoration thus resolved Miller's and Shaffer's claims. As Miller's and Shaffer's claims were effectively disposed of by the district court's decision, they are not properly the subject of an inquiry into the propriety of a Rule 54(b) certification.

The second of the three claims of the Equity Committee was directly addressed by the district court, which held that PBGC did have the authority to restore the Plans and that restoration must take into account the policies and goals of ERISA as well as those of bankruptcy and labor law. The first and third claims, however, were not directly addressed. As there were claims left unresolved, the appropriateness of a Rule 54(b) certification was properly raised.

In issuing a Rule 54(b) certification, a district court cannot merely announce that "there is no just reason for delay." "Rather, its certification must be accompanied by a reasoned, even if brief, explanation of its conclusion.'" *National Bank of Washington* v. *Dolgov*, 853 F.2d 57, 58 (2d Cir. 1988) (per curiam) (quoting *Cullen* v. *Margiotta*, 811 F.2d 698, 711 (2d Cir.), *cert. denied*, 107 S.Ct. 3266 (1987)). Here, in entering its judgment, the district court flatly stated that "there is no just reason for delay," without offering any explanation for its conclusion. Thus, it might appear that the Rule 54(b) certificate was defective, depriving us of appellate jurisdiction.

However, when reviewing the granting of a Rule 54(b) certificate "the standard against which a district court's exercise of discretion is to be judged is the 'interest of sound judicial administration.'" *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 10 (1980) (quoting *Mackey*, 351 U.S. at 437); *see Perez* v. *Ortiz*, 849 F.2d 793, 796 (2d Cir. 1988). In a similar vein, we have held that where the question of whether a Rule 54(b) certificate was improvidently granted is a close one, we may decline to dismiss the appeal "chiefly because we believe that our disposition of the appeal . . . will make possible a more expeditious and just result for all parties." *Gumer* v. *Shearson, Hammill & Co.*, 516 F.2d 283, 286 (2d Cir. 1974). In the instant case, it is more judicially efficient for us to exercise jurisdiction and reach the merits of the dispute now rather than cause a delay by demanding strict technical compliance with the certification requirement. While the district court did not provide a reasoned explanation, it is clear that if we were to decline to exercise jurisdiction and demand such an explanation, one could easily be provided, citing such factors as the multiplicity of parties involved, the importance of the central issue and judicial economy. The interest of sound judicial administration favors an expeditious resolution of the conflict presented here. *See Perez*,

849 F.2d at 796-97. We therefore hold that the district court did not abuse its discretion in granting the certification and we proceed to address the merits.

B. *The Merits*

Under Fed. R. Civ. P. 56(c), a motion for summary judgment should be granted only "when, viewing the record in the light most favorable to the nonmoving party, the evidence offered demonstrates that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law." *Cinema North Corp.* v. *Plaza at Latham Associates*, 867 F.2d 135, 138 (2d Cir. 1989) (citation omitted). As there were several material facts in dispute in the present case, the district court correctly denied the motion for summary judgment and undertook a review of PBGC's restoration decision.

PBGC is an administrative agency subject to the provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* (1982 & Supp. IV 1986), and its decisions are reviewable under the arbitrary and capricious standard found in 5 U.S.C. § 706(2)(A). Our inquiry into whether PBGC's decision was arbitrary and capricious must be based on the record that PBGC presented to the district court. *See Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-44 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). When reviewing an agency's decision, courts must determine whether the agency took all relevant factors into consideration in arriving at the decision. *See Overton Park*, 401 U.S. at 416; *Sierra Club* v. *United States Army Corps of Engineers*, 722 F.2d 1043, 1051 (2d Cir. 1985); *New York Council, Ass'n of Civilian Technicians* v. *Federal Labor Relations Authority*, 757 F.2d 502, 508 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985). Because ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and to the extent possible, honored the policies underlying them.

"One of Congress' central purposes in enacting [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980) (quoting Senator Bentsen, 3 *Legislative History of the Employee Retirement Income Security Act of 1974*, 94th Cong., 2nd Sess. 12 (Comm. Print 1976)). Accordingly, PBGC was created to encourage the maintenance of voluntary private pension plans, ensure the uninterrupted payment of pension benefits and maintain the premiums established by PBGC at the lowest possible level. ERISA section 4002, 29 U.S.C. § 1302; *see Belland* v. *Pension Benefit Guaranty Corp.*, 726 F.2d 839, 843 & n.4 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984).

The purpose of a Chapter 11 reorganization under the Bankruptcy Code "is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6179. Debtors in reorganization receive an automatic stay under section 362 of the Bankruptcy Code, 11 U.S.C. § 362, which prevents the recovery of any claim against the debtor that arose prior to the commencement of the bankruptcy case. Thus the results of a reorganization are the shielding of a debtor from the financial pressures imposed by its creditors, and the promotion of the equitable distribution of the debtor's assets to its creditors. *See NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983).

"A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial

peace to preserve the flow of interstate commerce. Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981) (citation omitted).

Although this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight. In fact, section 514(d) of ERISA, 29 U.S.C. § 1144(d), explicitly states that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law." *See also National Stabilization Agreement of the Sheet Metal Indus. Trust Fund* v. *Commercial Roofing & Sheet Metal*, 655 F.2d 1218, 1223 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). Thus, here the policies and goals of ERISA must be accommodated along with those of bankruptcy and labor law.

These bodies of law have been harmonized in several instances. Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, is meant to encourage collective bargaining. *In re Century Brass Prods., Inc.*, 795 F.2d 265, 273 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). Included as subjects of mandatory bargaining under section 1113 are retiree benefits and pension and insurance benefits for active employees. *See id.* at 274-75 (discussing *Allied Chem. & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)). Thus section 1113 of the Bankruptcy Code reflects labor law concerns. In 1986, we affirmed a district court decision that specifically stated "[t]he Bankruptcy Code and ERISA must be interpreted together." *In re Baptist Medical Center of New York, Inc.*, 52 B.R. 417, 419 (E.D.N.Y. 1985), *aff'd*, 781 F.2d 973 (2d Cir. 1986)

(per curiam). Hence, each of these areas of law is to be interpreted in light of the policies and goals of the other two.

In the instant case, a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other. Rather, PBGC focused inordinately on ERISA. This failure renders PBGC's decision arbitrary and capricious.

Even when we examine the factors upon which PBGC did base its decision, we find no support in the administrative record for the conclusion reached. Thus, the restoration decision is insupportable as a matter of law.

1. *Follow-on Plans*

PBGC based its restoration decision partly on its finding that the adoption of the 1987 CBA Plans, while LTV was in Chapter 11 reorganization, constituted an abuse of the termination insurance program. We disagree.

Although ERISA section 4047 states that PBGC may restore terminated plans "in any such case in which [PBGC] determines such action to be appropriate and consistent with its duties under this subchapter," 29 U.S.C. § 1347, this does not lead to the conclusion that PBGC may base a restoration decision on the establishment of follow-ons. As indicated *infra*, the legislative history of section 4047 and the intentions of ERISA, bankruptcy and labor law belie such an assertion.

The legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration. Congress' focus in enacting section 4047 was mandating restoration if there was an improvement in financial circumstances. "[A] terminated plan being operated by a trustee as a wasting trust may be restored if, during the period of its operation by the trustee, experience gains or

increased funding make it sufficiently solvent." H.R. Conf. Rep. No. 1280, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5158. Similarly, the legislative history of SEPPAA bears no indication that Congress considered the establishment of follow-on plans subsequent to an involuntary termination to be a ground for restoration. *See* H.R. Rep. No. 241, 99th Cong., 2nd Sess., pt. 2, at 51-55, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 709-13. The legislative history surrounding the most recent enactment of amendments to ERISA, the Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 9301-9346, 101 Stat. 1330, 1330-331—1330-374 (PPA), indicates that Congress considered and rejected the idea of prohibiting the establishment of follow-on plans and making the establishment of such plans a basis for a restoration decision. *See* H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 879-85, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1625—2313-1631. Although this amendment governs only terminations occuring after December 17, 1987 and thus is not applicable to the instant case, it reflects the continuing consensus not to include the establishment of follow-ons as a basis for a restoration decision.

Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, encourages collective bargaining for debtors in reorganization. That LTV was in reorganization was no reason for pension plans not to be the subject of bargaining. *See Century Brass*, 795 F.2d at 274. LTV, in entering collective bargaining with the Union, sought to ensure industrial tranquility by averting a strike. The Union was bargaining to ensure that its members received benefits commensurate with what had been promised them. Construing the policies of labor law and bankruptcy law in concert with ERISA's goal of the continued payment of pension benefits, we agree with the district court that the establishment of the 1987 CBA Plans was acceptable.

Not only is there no indication that the establishment of follow-ons is impermissible, but PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the 1987 CBA Plans were merely continuations of the old Plans. The record reflects only a brief comparison of the two sets of plans in the affidavit of C. David Gustafson, Manager of PBGC's Actuarial Policy Division. This is insufficient to support PBGC's conclusion. While the 1987 CBA Plans did continue many of the benefits that were guaranteed under the Plans, there are several differences in the two sets of plans. For instance, (1) none of the new programs under the 1987 CBA Plans are guaranteed by PBGC; (2) benefits under the new Plans are provided through welfare plans, insurance companies or general corporate assets, whereas benefits under the old Plans were provided under a single defined benefit plan; (3) the 1987 CBA Plans have more restrictive age and service eligibility requirements; and (4) the length of service does not necessarily increase the amount of some benefits under the new Plans. Nowhere in the record is there a showing that PBGC undertook an analysis of these differences.

Collective bargaining agreements can establish a contractual obligation to provide pension benefits, following termination of a plan, in excess of the amounts guaranteed by PBGC. ERISA contains no restriction on the employees' rights to receive benefits not guaranteed under ERISA. *See Murphy* v. *Heppenstall Co.*, 635 F.2d 233, 237-39 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982). From this it follows that the establishment of the 1987 CBA Plans, which contains some programs which are not guaranteed by PBGC and thus may be regarded as being in excess of the guaranteed benefits, does not violate any provisions of ERISA.

PBGC places substantial reliance on three of its opinion letters which express its policy against follow-on plans and identify factors that may result in the restoration

of terminated plans. The district court found that those letters concerned cases that were "too factually dissimilar from the instant case to be of substantial assistance here." We agree.

First, the opinion letters all involve cases of voluntary rather than involuntary terminations. Second, in two of the cases, the proposed new plans specifically contemplated the use of PBGC funds as an integral part of their financing, and would result in the employers conferring benefits to the employees at or greater than the pretermination level. In contrast, here the Plans were involuntarily terminated by PBGC. Additionally, there was no evidence that LTV contemplated the use of PBGC funds in the new Plans or entered into the 1987 CBA Plans in an attempt to assure its employees a high level of benefits while circumventing its obligation to fund the pension plans.

We note that intervenors-appellants Miller and Shaffer, in support of the restoration decision, raise the issue of the salaried employees' relative well being under the terminated Plans and under the follow-on plans. While they concede that they are financially better off under the follow-on plans than they would be under the PBGC guaranteed programs, they still advocate restoring the Plans because of the protections they would enjoy under ERISA. This, however, is not a reason to fault LTV's establishment of the follow-on plans. The Union had no obligation to bargain on behalf of the salaried employees. It acted in the best interest of its constituents in entering the 1987 CBA. The salaried employees benefited in that they too received higher benefits than they would have under the PBGC guaranteed levels. They should not now be heard to complain about the establishment of the follow-on plans.

For the foregoing reasons, the establishment of the follow-on plans cannot justify PBGC's restoration decision.

2. *Financial Circumstances*

PBGC points to LTV's improved financial condition, based on an alleged betterment that occurred between January and August of 1987 as one of its reasons for restoration. While improvement in financial circumstances is a basis for restoration, the administrative record does not support PBGC's finding that LTV's financial circumstances had improved substantially enough to justify restoration.

Interestingly, ERISA contains no standard by which to determine whether an employer can afford to resume liability for terminated pension plan programs. PBGC was thus left to its own discretion in assessing the financial well being of LTV. We believe that its assessment was erroneous.

a. *Summary Financial Analysis*

PBGC based its finding of LTV's financial ability to fund the Plans on a Summary Financial Analysis (the Analysis) prepared by a PBGC staff member based on information provided by LTV. The Analysis did not "attempt[] to project economic or other factors that w[ould] affect LTV in the future." There are several problems with the Analysis, its conclusions and PBGC's resultant decision.

The Analysis estimated that the cost of funding the Plans in 1988, with waivers granted, would be $260 million. According to the Analysis, the cost of supplemental benefits included in the 1987 CBA Plans, $90 million, was to be subtracted from the estimated 1988 cost because the supplemental benefits would be duplicative of benefits found in the restored Plans. Also to be subtracted from this figure was $50 million that was to be saved from job reductions obtained as a result of the 1987 CBA.

After each of the subtractions was made, the Analysis concluded that the cost of the programs in 1988 would be

$120 million. According to the figures before us, LTV Steel's net income for 1987 was estimated at $238.5 million. The projected operating income of LTV for January through May 1987 was $118.8 million, whereas the actual operating income was $163.7 million. Reviewing these data, the Analysis stated that "[b]ased on LTV's own cash flow projections, it appears that the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation."

This conclusion is problematic. The first problem with PBGC's restoration decision is that it was based partly on the fact that LTV's actual operating income for the first five months of 1987 had surpassed the amounts projected in the 1987-1988 Operating Plan. But, five months is too short a period of time to determine an income trend. A longer period of time should have been used to determine whether the improved financial conditions would have a long-lasting effect on LTV. Additionally, as the district court pointed out, "PBGC's calculation was based on two fundamental, yet unexplained and unexamined assumptions." One assumption was that LTV would be able to obtain IRS waivers of its funding contribution requirements for the years 1984-1986. The Analysis fails to take into account that the IRS had previously denied LTV's waiver request for 1985 and had revoked its waiver for 1984. The record discloses no reason to believe that the IRS, after having denied previous waiver requests, would grant such requests in 1987. Accordingly, if the Plans were to be restored, LTV would immediately become liable for contributions that it owed for the years 1984-1986, thereby seriously impairing its financial ability to fund the Plans.

The other unexplained assumption was that the $50 million savings resulting from job reductions made pursuant to the 1987 CBA would be preserved in subsequent bargaining agreements. The Union made these concessions because it was faced with a choice between receiving none of the nonguaranteed benefits or receiving some of them if it made concessions. If PBGC restores the Plans, the Union will get back all of its benefits automatically. Under these circumstances, the Union will have no incentive to make similar concessions. Thus there is no basis for assuming that the Union will make concessions following restoration of the Plans.

Because these two assumptions are unjustified, the basis for the Analysis' conclusion that LTV could support the reinstatement of the Plans is substantially undermined.

b. *Effect of Chapter 11 Reorganization*

PBGC did not effectively assess the impact that LTV's status as a debtor in Chapter 11 reorganization had on its financial condition. As a Chapter 11 debtor, LTV was able to reschedule some of its debt obligations and in effect free up its cash flow. Hence, looking at LTV's cash flow figures, it might appear that LTV's financial position had improved, when in reality, the apparent improvement was directly linked to its basic financial plight.

A second factor related to LTV's position as a Chapter 11 debtor in reorganization that must be considered is the status of the claim for payment into the pension plans. Pension benefits accrue to employees as a result of their past labor on behalf of the employer. In the instant case, the employees of LTV have given their labor in consideration for receiving pension benefits from LTV. This occurred prior to LTV's bankruptcy filing. Thus, any claims arising out of LTV's obligation to pay into the pension fund plans are pre-petition debts. *See Trustees of the Amalgamated Ins. Fund* v. *McFarlin's, Inc.*, 789 F.2d 98, 103-04 (2d Cir. 1986). Pre-petition debts are satisfied by a fair distribution of the debtor's assets, each creditor receiving a proportionate share of the amount of its claim. Hence, any additional money

that LTV has must be distributed fairly among the creditors, with the pension plans receiving no special priority. When all the pre-petition claims of LTV's other creditors are considered, and they receive their fair share of any additional funds, LTV's apparent ability to fund the Plans suffers.

The district court concluded that restoration did not implicate the automatic stay provisions of the Bankruptcy Code, but that if it did, restoration would be exempt from the automatic stay under section 362(b)(4) of the Code, 11 U.S.C. § 362(b)(4), as an act to enforce PBGC's regulatory authority in furtherance of the public health and welfare. We are less convinced than the district court that the automatic stay provisions are not implicated. However, we need not decide this question for we agree with the district court's alternative theory that restoration is exempt from the automatic stay. This holding is consisent with Congress' purpose in enacting ERISA—protecting the public welfare and the "continued well-being and security of millions of employees" who participate in pension plans. 29 U.S.C. § 1001(a).

c. *PBGC's Focus on Short Term Factors*

A major problem with PBGC's analysis of LTV's financial circumstances is that it focuses principally on factors that relate to LTV's short term economic condition. While LTV may have been able to fund the Plans for a limited period of time because of the improvement in its financial circumstances, the administrative record included no information addressed to the long term ability of LTV to fund the Plans.

ERISA is concerned with the promulgation and maintenance of plans that are viable in the long term as opposed to those that are uncertain or "pay-as-you-go." *See* 29 U.S.C. § 1002(31). Likewise, section 1.401-1 (b)(2) of the IRS Regulations, 26 C.F.R. § 1.401-1 (b)(2) (1988), which pertains to deferred compensation

and compliance with which is required for PBGC insurance, *see* 29 U.S.C. § 1321(a), states that "[t]he term 'plan' implies a permanent as distinguished from a temporary program." Here, if the restored plans were viable only for a short period of time, they might in the near future once again have to be re-terminated, thereby defeating the purposes and objectives of ERISA and the tax laws.

We note that nowhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated. ERISA contains no special provisions governing re-termination; however, the standards would be the same as for an initial termination. If in the near future LTV were once again found unable to adequately fund the Plans, the resulting vacillation in agency policy would lead to uncertainties on the part of the retirees, plan sponsors, creditors and the government. Such uncertainty is to be avoided where possible. *See New York Council, Ass'n of Civilian Technicians*, 757 F.2d at 508.

In sum, the administrative record does not support PBGC's conclusion that LTV could afford to fund the pension plans. In contrast to sound administrative agency decisionmaking, in reaching its determination of LTV's financial viability, PBGC placed undue reliance on some factors and not enough on others.

3. *Willingness*

The third articulated basis for PBGC's decision was LTV's demonstrated willingness to fund pension plans. On appeal, PBGC contends that this rather amorphous factor is "subsumed in the other two" and therefore need not be addressed separately. We agree and thus decline to discuss it further.

In summary, we are left with the conclusion that PBGC's restoration decision was arbitrary and capricious.

See Motor Vehicle Mfrs. Ass'n v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

4. *PBGC's Procedural Approach*

Section 4047 of ERISA, 29 U.S.C. § 1347, does not discuss the procedures that are to be followed by PBGC when reaching a restoration decision. However, when assessing an agency's actions under the arbitrary and capricious standard, it is a principle of fundamental fairness that

> [a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that [it] may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Bowman Transp., Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974). Consistent with this view, we have previously held that an agency must "proceed[] in accordance with 'ascertainable standards,' and provide[] a statement showing its reasoning when applying the standards." *Patchogue Nursing Center* v. *Bowen*, 797 F.2d 1137, 1143 (2d Cir. 1986) (quoting *Holmes* v. *New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968)), *cert. denied*, 479 U.S. 1030 (1987). In the instant case, PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a plan sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying those standards. Failure to do any of these things renders the decision arbitrary and capricious.

CONCLUSION

On remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the district court and to us, its decision cannot be upheld. Because PBGC's decision was not sustainable on the administrative record, the district court provided the appropriate remedy by vacating PBGC's Restoration Notice and remanding the matter to PBGC. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978); *Camp* v. *Pitts*, 411 U.S. at 143. On remand, PBGC should consider all of the issues, including those raised by the Equity Committee that previously were left unresolved.

Affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CHATEAUGAY CORPORATION, REOMAR, INC.,
THE LTV CORPORATION, *et al.*,
Debtors.

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87 Civ. 6863 (RWS)

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,
—against—

THE LTV CORPORATION, *et al.*,
Respondents.

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87 Civ. 7261 (RWS)

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,
—against—

THE LTV CORPORATION, and LTV STEEL COMPANY, INC.,
Defendants.

OPINION

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SWEET, D. J.

The Pension Benefit Guaranty Corporation ("PBGC") has moved pursuant to Fed.R.Civ.P. 56 for an order granting summary judgment directing the LTV Corporation ("LTV") and LTV Steel Company ("LTV Steel") to comply with the PBGC's Notice of Restoration ("Restoration Notice") dated September 22, 1987 and to resume full responsibility for funding and administering three of LTV Steel's four major pension plans, which were terminated on January 12, 1987. LTV, for itself and on behalf of the other debtors and debtors-in-possession in these cases, has moved for an order decreeing and adjudging that the PBGC acted in violation of the automatic stay of section 362 of the Bankruptcy Code (the "Code") and a restraining order of the Bankruptcy Court by issuing the Restoration Notice and thereafter commencing an action to enforce it.

These motions in the context of the facts presented raise difficult and deeply perplexing issues concerning the reorganization of a corporate entity that includes the second largest steel company in the United States, the powers of a public corporation created by Congress to protect the pension benefits of more than 30 million American workers and their families, and the effect of congressionally sanctioned collective bargaining between the United Steelworkers of America ("USWA") and LTV. Underlying these issues is the fundamental question: what processes and institutions are to be responsible for the casualties suffered by a basic American industry that has been battered by intensive and successful competition from abroad?

No central authority in this litigation has spoken to this bedrock problem. No U.S.A., Inc. has been heard, or even exists. The issues have, therefore, necessarily been parsed in terms of the existing body of bankruptcy, labor and pension benefit law, largely created before the present exigencies existed. The threshold resolution of these competing considerations is, indeed, a daunting task but one assisted by excellence of counsel who have striven with some success to order these complexities. Whatever follows on remand, review or in the halls of Congress, it is this court's initial obligation to find the facts and to reach conclusions by the application of established analysis, where it exists, leading hopefully to the earliest possible resolution of the interests at issue.

The court has reached the following conclusions. First, with respect to the automatic stay, although the PBGC's claims against LTV Steel under Title IV are prepetition claims, restoration *per se* does not affect a recovery on those claims or in any other way constitute an act to possess or to control LTV Steel's assets. Restoration is simply one regulatory component of the federal pension insurance program that protects the nation's employees, and nothing in the Code or in ERISA justifies a debtor's reliance on that program except in cases of severe hardship. Second, with respect to the restoration decision itself, the 1,592 page Administrative Board (the "PBGC Record" or "Record") submitted by the PBGC in this case does not support the PBGC's decision to restore the Plans on any of the asserted grounds. There is no factual or legal basis for the PBGC's finding that LTV has abused the pension termination insurance program, and the record is not sufficiently developed to permit a finding that LTV Steel's financial condition has improved to the point where it can afford to sponsor its previously terminated plans.

Therefore, LTV's application to enforce the automatic stay by declaring restoration null and void is denied, as is the PBGC's motion for summary judgment. These findings and conclusions are described in the following portions of this opinion which set forth the context of the litigation, its prior proceedings, the issues raised, the resolution of the issues, and the conclusions reached at this stage of the litigation.

FACTS

LTV's 1986 Financial Difficulties and Chapter 11 Filing

LTV is a Delaware corporation active in four basic industries: steel, aircraft products, missiles and electronics and energy products. LTV's subsidiaries include LTV Aerospace and Defense Company, AM General Corporation, LTV Energy Products Company and LTV Steel, the nation's second largest steel operation, which was created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation.

Directly and through its subsidiaries, LTV has administered approximately thirty defined benefit pension plans, including the three plans at issue here: [1] the Jones & Laughlin Hourly Pension Plan ("J & L Hourly Plan"); the Jones & Laughlin Retirement Plan ("J & L Salaried Plan"); and the Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 ("Republic Hourly Plan") (collectively the "Plans"). The Plans are covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Single-Employer Pension Plan Amendment Act of 1986 ("SEPPAA")[2], 28 U.S.C. §§ 1301 *et seq.* (1987 Supp.), and are subject to the minimum funding standards in

[1] A fourth LTV Steel pension plan, the Republic Salaried Plan, which was terminated involuntarily in September 1986, was not restored by the PBGC.

[2] On December 22, 1987 Congress amended Title IV of ERISA with the enactment of the Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987 ("OBRA"), Pub.L.No. 100-203, 101 Stat. 1330 (Dec. 22, 1987). Because the Pension Protection Act antedated and, thus, does not apply to the events that give rise to this litigation, the description of ERISA's statutory scheme set forth below does not reflect the 1987 amendmens, and all citations to ERISA, as amended by SEPPAA, are to U.S.C. (1987 Supp.), except where expressly noted otherwise.

section 302 of ERISA, 29 U.S.C. § 1082, and section 412 of the Internal Revenue Code ("IRC"), 26 U.S.C. § 412.

LTV's intent in acquiring and merging three major steel companies was to combine them, shut down extraneous or outmoded facilities, and emerge with a streamlined, efficient steel company that could survive the extreme financial pressures placed on the steel industry in the late 1970s and early 1980s. The streamlining process resulted in massive lay-offs and premature retirements and corresponding massive pension liabilities. By 1986, LTV Steel had an extraordinary ratio of 77,182 retirees to 24,544 active workers, over 3 to 1.

On July 17, 1986, LTV and substantially all of its active subsidiaries, including LTV Steel, filed petitions for reorganization under Chapter 11 of Title 11 of the Code in the United States Bankruptcy Court for the Southern District of New York, but continued to manage and operate their businesses and properties as debtors-in-possession. The filing of the petitions triggered the automatic stay provisions of section 362 of the Code, and on July 17, the bankruptcy court issued a restraining order enforcing the provisions of the stay.

In connection with its ongoing financial difficulties, LTV Steel had resulted in 1985 funding waivers from the Internal Revenue Service ("IRS") for its minimum funding contributions to the Plans for the 1984 plan year.[3] The IRS granted the waiver request, permitting LTV Steel to amortize over 15 years the contribution of more than $170 million due for the 1984 plan year. In 1986 LTV Steel again requested contribution waivers for over $200 million owed to the Plans for the 1985 plan year and the amount of amortization for the 1984 plan year. The IRS denied that waiver request in November

[3] Under ERISA, unfunded benefit liability is amortized over time through annual payments by the plan sponsor into the plan. These payments are called minimum funding contributions.

1986 and revoked LTV Steel's 1984 waiver due to its failure to continue contributions after its Chapter 11 filings. As a result, LTV Steel immediately owed more than $350 million in past unfunded contributions to the Plans for the two years.[4] LTV Steel made some contributions in 1986 to amortize the 1984 waivers, but made no contributions for the 1985 plan year. In addition to LTV Steel's accumulated funding deficiencies, at the time LTV entered Chapter 11, the total present value of LTV Steel's future pension liabilities exceeded $2 billion.

The 1986 Collective Bargaining Agreement

On April 1, 1986, a few months before its Chapter 11 filing, LTV Steel had concluded negotiations for a collective bargaining agreement ("1986 CBA") with the USWA. The USWA had agreed to concessions which reduced labor costs by $3.44 per hour. In return, the 1986 CBA provided for an employee profit sharing and stock plan pursuant to a new Employee Investment Program ("1986 EIP") which would be funded with stock in lean years and cash in profitable years. The 1986 CBA included the Jones & Laughlin and the Republic Pension Agreements ("1986 Pension Agreements"), pursuant to which LTV Steel established the J & L Hourly Plan and the Republic Hourly Plan. The 1986 Pension Agreements did not limit LTV Steel's obligation to provide benefits in the event of termination of any pension agreements or termination of the pension plans or any pension trusts. Under the pension agreements, LTV Steel's obligations to fund and pay benefits continue beyond any termination of the agreements themselves.[5]

[4] $175 million of LTV Steel's obligation had been secured by a pledge of stock of LTV's aerospace and defense subsidiary.

[5] Paragraph 10.2 of both the J & L and the Republic Pension Agreements provides: "Any benefit properly payable pursuant to this Agreement shall continue to be payable, notwithstanding the termination or expiration of this Agreement."

The PBGC and Title IV of ERISA

The PBGC is a wholly-owned United States government corporation that was established in section 4002 of ERISA, 29 U.S.C. § 1302, to insure pension benefits under terminated pension plans and to administer and enforce the provisions of Title IV of ERISA which creates a pension plan termination insurance system. The PBGC's regulatory, investigatory and enforcement authority is set forth in sections 4002 and 4003 of ERISA. The PBGC, for example, may adopt such rules and regulations "as may be necessary to carry out the purposes of [Title IV]," 29 U.S.C. § 1302(b)(3), and "may make such investigations as it deems necessary to enforce any provision of [Title IV]," 29 U.S.C. § 1303 (a). Moreover, under section 4003(e)(1) of ERISA, the PBGC may bring "[c]ivil actions . . . for appropriate relief, legal or equitable or both, to enforce the provisions of [Title IV]." 29 U.S.C. § 1303(e)(1).

Title IV sets forth procedures for the termination of single-employer pension plans by plan administrators, 29 U.S.C. § 1341, or by the PBGC, 29 U.S.C. § 1342, and permits the appointment of the PBGC as the trustee of a terminated plan. *Id.* The statute requires the PBGC to guarantee the payment of nonforfeitable benefits under terminated plans, subject to certain prescribed limitations. *See* 29 U.S.C. §§ 1322, 1322b, 1342. This statutory guarantee is funded primarily by annual insurance premiums paid by the administrators of covered plans. PBGC funds, however, also consist of the amount of employer liability payments collected under section 4062 of ERISA. 29 U.S.C. § 1362; *see also* 29 U.S.C. § 1305.

Section 4062 of ERISA imposes liability on employers whose plans terminate with insufficient assets to pay guaranteed benefits. Such employers are liable to the PBGC for part of the terminated plan's unfunded guaranteed benefits. *See* 29 U.S.C. § 1362(b). Section 4068

of ERISA creates a lien in favor of the PBGC for the amount of its claim under section 4062 which has the priority status of a tax lien under 26 U.S.C. § 6323. *See* 29 U.S.C. § 1368(a), (c). In addition, an employer may be liable to a trust established by the PBGC for plan participants for the outstanding amount of certain unfunded "benefit commitments" that exceed the guaranteed benefits payable by the PBGC. *See* 29 U.S.C. §§ 1342(i), 1362(c), 1349.[6] An employer may also be liable to the PBGC in PBGC's capacity as the statutory trustee of a terminated plan for the plan's accumulated funding deficiencies, for the outstanding balance of waived funding deficiencies, and for the outstanding balance of the amount of previously allowed decreases in the minimum funding standard. *See* 29 U.S.C. § 1362(d).

The Pension Protection Act of 1987 ("PPA") includes amendments to ERISA that enhance the PBGC's rights of several major respects with respect to plans terminated on or after December 27, 1987. For example, the PPA amendments allow the PBGC to perfect a lien upon all of the property of each member of a plan sponsor's "controlled group"[7] for missed minimum funding contributions and make all members responsible for plan funding obligations when due. Prior to these amendments, controlled group liability for certain unfunded benefits

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[6] Sections 4042(i), 4062(c) and 4049 of ERISA, 29 U.S.C. §§ 1342(i), 1362(c), 1349, were either repealed or substantially modified by the Pension Protection Act of 1987. A plan administrator's liability to the PBGC for the "total amount of unfunded benefit liabilities" is now governed by section 4062(b)(1)(A) of ERISA. *See* 29 U.S.C. § 1362(b)(1)(A) (1988 Supp.).

[7] The PPA amendments define "controlled group" to include the plan sponsor and "all other persons under common control" with the sponsor within the meaning of the Internal Revenue Code ("IRC") and Regulations thereunder. *See* 29 U.S.C. § 1301(a)(14) (1988 Supp.). Under the IRC and Regulations, LTV Aerospace and LTV Steel are members of the same controlled group. *See* 26 U.S.C. § 414(b), (c); Treas. Reg. § 11.414(c) -1 through -5.

became fixed only upon plan termination. The PPA also gives the PBGC the right, upon plan termination, to seek 100% reimbursement from controlled group members for "the total amount of unfunded benefit liabilities." *See* 29 U.S.C. § 1362(b)(1)(A) (1988 Supp.). Previously, the PBGC's reimbursement claim upon termination was effectively limited to 75% of the unfunded guaranteed benefits. The PPA amendments do not apply to pension plans, like the Plans at issue here, that were terminated prior to December 17, 1987.

The PBGC's Involuntary Termination of the Plans

Because of the Plans' failure to meet ERISA's minimum funding requirements and LTV Steel's precarious financial condition, the PBGC reviewed the Plans' status in December 1986 under ERISA's involuntary termination provisions. The PBGC determined that the Plans were severely underfunded, even though they had sufficient assets to pay benefits then in pay status for several years without additional contributions. The underfunding for guaranteed benefits as of December 1986 was estimated at more than $2 billion. Moreover, the underfunding was expected to increase by an estimated $65 million in 1987 and by an additional $63 million in 1988. The estimated additional cost to the Plans of shutdown benefits was in the range of $300-$700 million for more than 6,000 entitled participants.

On December 16, 1986 LTV informed PBGC by letter that "because LTV is currently in reorganization under Chapter 11 of the Bankruptcy Code, LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies," and that LTV "does not intend, and is not likely to have the ability, to fund the Plans for future years." Thereafter, on January 12, 1987, PBGC initiated proceedings under section 4042 of ERISA, 29 U.S.C. § 1342, to terminate the Plans and to be appointed statutory trustee, on the

grounds that termination was necessary to avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the liability of the PBGC's insurance funds. LTV, the administrator of the Plans, consented to the terminations. On January 12, this court issued consent orders terminating the Plans effective January 13, 1987 and appointing the PBGC as statutory trustee.[8]

As of the termination date of January 13, 1987, the Plans' assets were insufficient to pay the benefits guaranteed under Title IV of ERISA. Accordingly, PBGC became responsible for paying Plan benefits to the extent of the statutory guarantee in ERISA. *See* 29 U.S.C. § 1322. The PBGC guarantees only nonforfeitable benefits and does not guarantee benefits becoming nonforfeitable solely on account of the plan termination. *Id.*; 29 C.F.R. § 2613.6 (1987). In addition, the PBGC's statutory guaranty does not cover certain amounts and types of benefits that had been provided under the Plans.

Following termination of the Plans, therefore, payments of current pension benefits payable under the 1986 Pension Agreements were reduced to the extent they were not guaranteed by the PBGC. Certain early retirement, disability, and surviving spouse benefits not guaranteed by the PBGC were terminated completely. As a result, more than 7,000 LTV pensioners under the age of 62 immediately had their monthly pensions reduced by as much as $400. Thousands of retirees who were solely dependent on pension benefits for food, clothing, housing and other essentials received substantially reduced pension benefits following termination. Thousands of current employees who had worked in return for a

[8] *In re Jones & Laughlin Hourly Pension Plan*, No. 87 Civ. 0232 RO (S.D.N.Y. Jan. 12, 1987); *In re Jones & Laughlin Retirement Plan*, No. 87 Civ. 0235 RO (S.D.N.Y. Jan. 12, 1987); *In re Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950*, No. 87 Civ. 0234 RO (S.D.N.Y. Jan. 12, 1987).

contractually guaranteed right to early retirement thereafter forfeited such benefits and stopped accrual of service for any pension plan. Surviving spouses of employees who died while actively employed also lost certain pension benefits.

The USWA Lawsuit for Non-Guaranteed Benefits

In response to the hardship inflicted upon its members by the Plan terminations, on January 16, 1987 the USWA initiated an adversary proceeding in the bankruptcy court seeking payment under the 1986 Pension Agreements.[9] The USWA lawsuit alleged that LTV Steel's failure to provide the full benefits set forth in the Plans constituted an abrogation of the 1986 CBA and a violation of section 1113 of the Code. The PBGC intervened and opposed the USWA's request that LTV Steel pay the nonguaranteed portion of the benefits, arguing that requiring "the Debtor to continue to pay the prepetition claims of retirees outside of a Chapter 11 plan of reorganization" would be inconsistent with ERISA and "would pervert . . . the collection scheme for prepetition debt embodied in the Bankruptcy Code."

The USWA lawsuit represented only one of the measures the USWA was prepared to take against LTV Steel. The USWA had inflicted a damaging strike on the Wheeling-Pittsburgh Steel Company, also a Chapter 11 debtor, for failure to pay pension benefits after its plan termination. At the very beginning of the LTV cases, the USWA had struck Indiana Harbor, LTV Steel's most

[9] Immediately upon learning of the terminations, the USWA, as an intervenor, moved to vacate the consent orders and obtain an evidentiary hearing on the PBGC's request for a court order approving the terminations. The district court denied the motions to vacate. The USWA appealed and the Court of Appeals for the Second Circuit affirmed the district court's orders. *Jones & Laughlin Hourly Pension Plans v. The LTV Corp.*, 824 F.2d 197 (2d Cir. 1987).

important facility, in response to LTV's inability to pay certain retiree benefits. Before the strike spread, LTV Steel obtained court authority to pay these benefits. *See In re Chateaugay Corp.*, 64 B.R. 990 (S.D.N.Y. 1986). LTV Steel was well aware, therefore, that the USWA could take powerful action to compel the payment of benefits under the 1986 CBA.

The 1987 Interim Collective Bargaining Agreement

In an effort to resolve the USWA lawsuit, LTV Steel obtained bankruptcy court approval in April 1987 to make a single hardship payment to each retiree at a cost of $6.7 million and thereafter began negotiating an interim agreement with the USWA. Following weeks of intense bargaining, negotiators for the USWA and LTV Steel reached a tentative agreement on May 13, which was rejected by the local union presidents. Under the threat of a major strike, which LTV Steel estimated would have cost the company $100 million per month, the parties resumed bargaining on May 26. On June 25 the local presidents approved an agreement (the "1987 CBA") which replaced most of the lost (i.e., nonguaranteed) benefits to retirees and created new benefit programs for active workers.

The 1987 CBA is an interim agreement that governs the relationship between LTV Steel and the USWA until confirmation of a plan of reorganization. The 1987 CBA provides that if "any of its provisions become unenforceable" or if PBGC pension payments for guaranteed benefits are not realized on a continuing basis, the 1987 CBA may be terminated, upon notice, by either party and the 1986 CBA will then "snap back" and be in full retroactive and prospective force. It also provides that payments thereunder will offset any equivalent bankruptcy claims against LTV Steel, and will be offset by any equivalent benefit paid by any trust established pursuant to section 4049 of ERISA, 29 U.S.C. § 1349. Further,

the 1987 CBA specifically provides that it settles the USWA's suit for retirement benefits.

The 1987 CBA has several major components which together revise certain terms and conditions of employment for LTV Steel's union workers. LTV asserts that three of these components—cost sharing health and life insurance programs, maintenance craft efficiencies, and job elimination—will ultimately generate annual savings to LTV Steel of $50 million. LTV Steel, however, anticipates paying an estimated $70-$75 million annually to fund six other components, which comprise the new retirement programs. These new benefit programs are: the Individual Account Trust ("USWA IAT"); the LTV Steel/USWA Pension Plan ("USWA Pension Plan"); the Lump Sum Severance Program; the Pre-Retirement Surviving Spouse Benefit; the Disability Income Benefit Plan; and an Extended Supplemental Unemployment Benefit Plan ("Extended SUB Plan") (collectively, the "1987 CBA Plans").

Court Approval of the 1987 CBA

On July 8, 1987, LTV Steel applied to the bankruptcy court for approval of the 1987 CBA. LTV's Senior Vice President and Chief Financial Officer, and LTV Steel's Vice President of Industrial Relations, testified that the interim agreement was necessary to avoid a crippling strike and to permit LTV and LTV Steel to reorganize. In opposition, the Executive Director of the PBGC testified that portions of the new pension programs violated a PBGC policy against post-termination benefit arrangements that constitute, in its view, a *de facto* continuation of previously terminated pension plans. Over the PBGC's objections, the bankruptcy court approved the agreement, exercising its equitable powers under 28 U.S.C. § 157(b) and section 105 of the Code, 11 U.S.C. § 105, to ensure the success of reorganization, stating:

> Based upon the complete record before me today, including all filed papers, it has become abundantly clear that this Court may and should utilize its equitable power to authorize the terms and payments contemplated by the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor.

PBGC Record, p. 622. The bankruptcy court found that the PBGC's claims of ERISA "abuse" or "illegality," which did not address the authority of the bankruptcy court to authorize interim payments, were premature. By orders dated July 30, 1987, the bankruptcy court granted LTV Steel's application in all respects.[10]

Both before and after the bankruptcy court's ruling, the PBGC attempted to stay implementation of the 1987 CBA. The bankruptcy court, this court, and our Court of Appeals, denied the PBGC's applications. Finally, the PBGC appealed the bankruptcy court order approving the interim agreement to this court. LTV Steel moved to dismiss the appeal on the grounds that the July 30 order was only an interim order governing the conduct of the parties during reorganization. In response, the PBGC withdrew its appeal, without prejudice to renewal.

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[10] In its application, LTV also asked the bankruptcy court for authority to establish similar pension arrangements for non-union salaried employees and retirees in the J & L Salaried Plan, in an Individual Account Trust ("Salaried IAT"). At the same time, but by separate application, LTV asked the bankruptcy court for authority for LTV Steel to make pre-petition stock contributions to the 1986 EIP, the profit sharing and employee stock ownership program covering approximately 27,621 LTV Steel employees that had been established in the 1986 CBA. The USWA had insisted that implementation of the 1986 EIP, which was designed to compensate employees for their economic concessions under the 1986 CBA, was an absolute prerequisite for any USWA concessions for the 1987 CBA.

The Restoration of the Plans

In August 1987, the PBGC's SEPPAA Trusteeship Working Group (the "SEPPAA Working Group" or "Group"), an administrative group established to provide advice to the agency regarding plan terminations and related matters under Title IV, met to consider restoring the Plans. The Group reviewed the status of LTV Steel's ongoing reorganization, including the establishment of the 1987 CBA pension programs and what it perceived to be LTV Steel's improved financial circumstances. After discussing the purposes of Title IV and the PBGC's duties and obligations thereunder, the Group concluded that the 1987 CBA plans abused the termination insurance program by providing, together with the PBGC's payment of guaranteed benefits, substantially the same benefits as were provided under the terminated Plans. Moreover, in addition to noting significant improvement in LTV Steel's financial situation, the Group noted LTV Steel's agreement to contribute an estimated $90 million to fund benefits pursuant to the 1987 CBA plans and to contribute an additional $90 million in value to the 1986 EIP. The Group also considered actuarial estimates of the minimum funding costs if the Plans were restored.

In addition, the Group considered a financial analysis ("PBGC Summary Financial Analysis") of LTV based on information provided to the Official Committee of Unsecured Creditors which, the Group concluded, indicated that LTV Steel alone would be able to fund the restored Plans in the near future, although the PBGC did not have sufficient data to predict LTV Steel's long-term cash flow with any certainty. In addition, the PBGC Summary Financial Analysis suggested that LTV and the members of its controlled group would generate more than enough cash in the immediate future to support the Plans if restored.

Based on its analysis of LTV's financial condition and on the assumption that LTV Steel would obtain funding waivers from the IRS for the 1984-86 plan years, the Group estimated the total annual funding costs for the Plans upon restoration to be $260 million. The Group then deducted an estimated $90 million in annual funding costs for the 1987 CBA Plans to arrive at an incremental cost of full restoration of $170 million. Based on a further assumption that annual savings of $50 million from negotiated job reductions and other USWA concessions would be realized whether or not the Plans were restored, the Group calculated the net effect of restoration after the job reductions to be somewhat less than $120 million.

Against this estimate of the cost of restoration, the Group weighed LTV Steel's consolidated financial results as forecast in the LTV Corporation and Subsidiaries 87-88 Operating Plan (the "1987-1988 Operating Plan"). The 1987-1988 Operating Plan estimated net income from LTV Steel of $239 million in 1987 and $260 million in 1988; net cash flow from LTV Steel of $270 million and $265 million, respectively, in those years; and $267.9 million annual operating income from LTV Steel in 1987. The Group also considered LTV Steel's actual operating income for the period from January through May 1987 which exceeded the Operating Plan's estimates by $44.9 million.

Having considered this information, the Group decided that restoration was necessary to prevent abuse of the pension termination insurance program. The Group accordingly voted unanimously to recommend restoration based on the establishment of abusive follow-on plans, the improvement in LTV Steel's financial condition, and LTV Steel's demonstrated willingness to fund employee retirement plans.

The SEPPAA Working Group's recommendation was forwarded to the Executive Director of the PBGC for

approval. Before acting on the recommendation, the Executive Director asked for general policy guidance on restoration from the PBGC's Board of Directors, which consists of the Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Labor, who is the Chairman of the Board. *See* 29 U.S.C. § 1302(d). After meeting briefly to consider the matter by telephone conference call on September 18, 1987, the Board unanimously adopted a resolution that "confirms, as a matter of policy, that the PBGC may exercise its discretion under Section 4047 of ERISA to restore plans as appropriate," and "affirms the authority of the Executive Director of the PBGC to determine when particular pension plans should be restored and to take all appropriate actions necessary to effect those determinations." PBGC Record, p. 1583.

Before the SEPPAA Working Group first met to consider restoration of the Plans, the PBGC had had several meetings and had exchanged letters with representatives of LTV and the USWA in May and July 1987 as the parties attempted unsuccessfully to resolve the PBGC's objections to the 1987 CBA Plans. In early September 1987, LTV's Chief Executive Officer called the PBGC's Principal Deputy Executive Director to ask whether it was true that the PBGC had decided to restore the Plans. Upon being informed that the agency had not reached a final decision on what action it would take in response to the 1987 CBA Plans, but that restoration was still being considered as an option, LTV requested an additional meeting with the PBGC. The PBGC's Executive Director responded by letter that the agency "would, of course, be happy to consider any additional information you might wish to supply." PBGC Record, p. 1572. As a result, representatives from LTV and the PBGC met in Washington on September 12 and 21, 1987. In response to the PBGC General Counsel's inquiry as to the effects on interested parties of restoration, LTV's outside

counsel stated that the economic effect of restoration was unclear and that restoration would give rise to time-consuming litigation, cast doubt on the reorganization, and be hard on other creditors.

The Notice of Restoration

On September 22, 1987, the Executive Director adopted the recommendation of the SEPPAA Working Group to restore the Plans and executed and sent the Restoration Notice to LTV and LTV Steel restoring the Plans, effective immediately, to their pretermination status as of January 13, 1987. The Restoration Notice explained that the PBGC had determined that restoration was appropriate and consistent with its duties under Title IV of ERISA because, among other things: (1) LTV Steel had abused the pension plan termination insurance program by establishing follow-on plans that essentially continued the termination Plans, with the PBGC picking up much of the cost; (2) the financial condition of LTV Steel had substantially improved since the Plans were terminated; and (3) LTV Steel had demonstrated its willingness to fund retirement programs.

The Restoration Notice informed LTV and LTV Steel that restoration "means that the Plans are ongoing since [January 13, 1987] for all purposes, including . . . minimum funding obligations" and that "[b]enefit payments to retirees that were reduced because of the termination shall be restored to their full amounts under the terms of the Plans, and the Plans shall pay to such retirees any amounts that were not paid because of the terminations, together with interest . . . ." PBGC Record, p. 1578. The Restoration Notice also informed LTV that, as plan administrator of the restored Plans, it must comply with all of the fiduciary duties of a plan administrator under ERISA and under the terms of the Plans.

PRIOR PROCEEDINGS IN THIS COURT

Asserting that restoration of the Plans violated the automatic stay under section 362 of the Code, LTV obtained, on September 23, 1987, an order to show cause from the bankruptcy court seeking, *inter alia*, a finding that the restoration violated the automatic stay and was, therefore, null and void (the "Stay Application"). On September 24, 1987, the PBGC moved for the withdrawal of the reference of the Stay Application under 28 U.S.C. § 157(d). On November 24, 1987, this court granted the PBGC's motion to withdraw the reference, finding that "the presence of significant issues of first impression, considerations of judicial economy, and the need to protect participants in the restored Plans from unduly protracted uncertainty about the status of their benefits" established sufficient cause for withdrawal. *PBGC v. The LTV Corp.*, No. 87 Civ. 6863, slip op. at 13-14 (S.D.N.Y. Nov. 24, 1987).

On September 28, 1987, LTV applied to the bankruptcy court for appointment as administrator *ad litem* of the Plans and for the appointment of Mellon Bank as trustee *ad litem* of the Plans. On September 28, the bankruptcy court entered consent orders appointing LTV administrator *ad litem* and Mellon Bank trustee *ad litem* of the Plans. The PBGC consented to the orders, but reserved its position that entry of such orders was neither necessary nor within the jurisdiction of the bankruptcy court. The orders provide that they are without prejudice to the PBGC's right to seek to vacate or modify the orders. The orders authorize payment of benefits from the assets of the Plans at least at the level guaranteed by the PBGC and expressly do not prejudice the positions of any interested party as to the appropriate level of benefits payable from the Plans.

As a result of LTV's refusal to comply with the restoration, evidenced, *inter alia*, by LTV's application for *ad litem* appointments and failure to pay benefits at full Plan levels, the PBGC filed a complaint in this court on

October 9, 1987, to require LTV to operate the Plans as ongoing plans in compliance with the restoration (the "Enforcement Action"). This court, which had before it the PBGC's motion to withdraw the Stay Application, accepted the Enforcement Action as a related matter. On November 3, 1987, LTV supplemented the Stay Application to assert that, like the restoration, PBGC's Enforcement Action also violated the automatic stay.

On December 31, 1987, LTV filed an answer and counterclaim in the Enforcement Action. By that same date, various creditor groups affected by LTV's Chapter 11 petition had been permitted to intervene by stipulation: the Official Committee of Unsecured Creditors of LTV Corporation *et al.* (the "Committee"), the Committee's Subcommittee of Parent Creditors, and the LTV Bank Group. Later, on January 11, 1988, the Committee of Equity Security Holders intervened by stipulation. On January 15, 1988, the Motion to Intervene of BancTexas Dallas was granted. On January 21, 1988, a stipulation was filed in which LTV and the PBGC agreed to the intervention of the Fifth Third Bank, the Huntington National Bank, and Citibank. Finally, on January 26, 1988, the motion to intervene filed by two individual participants in the J & L Salaried Plan, David H. Miller and William W. Shaffer, was granted. Oral argument on Miller and Shaffer's motion for class certification was held on June 6, 1988.

Following limited discovery, the submission of briefs from the PBGC, LTV and the intervenors and other interested parties,[11] oral argument was held on March 4, 1988 on the PBGC's motion for summary judgment in its Enforcement Action and LTV's Stay Application.

[11] The USWA filed a memorandum of law as *amicus curiae* in which the union argues that the 1987 CBA Plans are legal in all respects and cannot constitute a basis for restoration. In addition, Solidarity USA, Inc., a nonprofit corporation organized under the laws of Ohio and representing certain retirees who were hourly employees of LTV Steel, has filed a memorandum of law as *amicus curiae* in support of the PBGC's motion for summary judgment.

THE STAY APPLICATION

I. *The Automatic Stay*

LTV contends that the Restoration Notice and the Enforcement Action violate the automatic stay in sections 362(a)(1), a(3), and a(6) of the Code. Section 362(a) of the Code provides that, unless the Code expressly provides otherwise, the filing of a petition for reorganization operates as a stay, applicable to all entities of:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> * * * *
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> (3) any act to obtain possession of property of the estate or of property from the estate, or to exercise control over property of the estate;
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> * * * *
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of a case under this title.

11 U.S.C. § 362(a). Section 362 is intended to provide a breathing spell for the debtor and to guarantee equal treatment for creditors. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 2d Sess. 340 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6296-97; *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093, *reh'g denied*, 430 U.S. 976 (1977).

The legislative history of section 362 reveals clear congressional intent that the automatic stay be broadly enforced so as to preserve the *status quo* as of the petition

date, insure the orderly administration of a bankruptcy estate and prevent a race among creditors:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. . . .
>
> Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case. The commencement or continuation, including the issuance of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case is stayed under paragraph (1). The scope of this paragraph is broad. All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings . . . even if they are not before governmental tribunals.
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> * * * *
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> Paragraph (3) stays any act to obtain possession of property of the estate (that is, property of the debtor as of the date of the filing of the petition) or property from the estate (property over which the estate has control or possession). The purpose of this provision is to prevent dismemberment of the estate. . . .
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> * * * *

> Paragraph (6) prevents creditors from attempting in any way to collect a prepetition debt.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 340-42 *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6296-98; *see also* S. Rep. No. 989, 95th Cong., 2d Sess. 49-51, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5835-36.

LTV contends that, by restoring the Plans, the PBGC seeks to impose additional liabilities upon LTV so that a greater portion of LTV's assets will be paid to the PBGC and to satisfy its multibillion dollar claim against LTV Steel ahead of other creditors. Upholding the PBGC's actions, LTV argues, would frustrate the two major purposes of the Code: "achieving equality among creditors and giving the debtor a fresh start." *In re B. D. Int'l Discount Corp.*, 701 F.2d 1071, 1075 n.8 (2d Cir.), *cert. denied*, 464 U.S. 830 (1983).

The PBGC contends that neither restoration nor the Enforcement Action "was or could have been commenced before the commencement of the case under [Chapter 11]." 11 U.S.C. § 362(a)(1). The PBGC argues that under Title IV of ERISA, the PBGC's claims against LTV Steel first arose post-petition and that, in any event, neither restoration nor the Enforcement Action is an act to recover such claims. *See* 11 U.S.C. § 362(a)(1), (a)(6). In addition, the PBGC contends that because restoration does not directly affect the assets or property of LTV Steel, neither restoration nor the Enforcement Action constitutes an act "to obtain property of . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Finally, the PBGC asserts that both restoration and the Enforcement Action are excepted from the stay by section 362(b)(4) of the Code because they are regulatory enforcement actions taken to further the important public policies underlying ERISA.

II. *The Nature of the PBGC's Claims*

Section 104(4) of the Code defines "claim" to mean:

> (A) *right to payment, whether or not such right is* reduced to judgment, liquidated, unliquidated, fixed, *contingent*, matured, *unmatured*, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(4) (emphasis added). The legislative history of 11 U.S.C. § 101(4) reveals that Congress intended to define prepetition claims broadly:

> The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. . . . By this broadest possible definition and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6266; *see also* S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5807-08. The broad definition of "claim" is central to the policy of a "fresh start" for a debtor and permits a debtor to receive "the broadest possible relief in the bankruptcy court," because liability on a "claim" can be discharged only by the confirmation of a plan of reorganization.

Id.; *see* 11 U.S.C. §§ 101(11), 1141(d); *see also In re A.H. Robins Co.*, 63 B.R. 986, 989 (Bankr. E.D. Va. 1986), *aff'd sub nom. Grady v. A. H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988).

The PBGC has two major types of claims against LTV. As the agency responsible for administering and enforcing Title IV, the PBGC has a claim under section 4062 (b) of ERISA, 29 U.S.C. § 1362(b), for statutory "termination liability" in the amount by which Plan assets were insufficient to satisfy guaranteed benefits on the date of plan termination. In addition, the PBGC has a second statutory claim under section 4062(d) of ERISA, 29 U.S.C. § 1362(d), asserted in its capacity as statutory trustee on behalf of the Plans, for due and unpaid minimum funding contributions.[12] *See also* 29 U.S.C. § 1082; 26 U.S.C. § 412. The PBGC contends that under ERISA these claims first arose upon the post-petition termination of the Plans.

Section 4062(a) provides that any contributing sponsor of a plan, or a member of such sponsor's controlled group, shall incur termination liability "in any case in which a single-employer plan is terminated." 29 U.S.C. § 1362(a). Such liability "shall be due and payable to the [PBGC] as of the termination date." 29 U.S.C. § 1362(a), (b)(2)(A). Section 4068 of ERISA, which

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[12] On November 30, 1987, the PBGC filed these claims, which were non-contingent during the period between the termination of the Plans on January 13, 1987, and the restoration on September 22, 1987, as contingent claims in the bankruptcy case based on the contingency that restoration is held to be ineffective or that a subsequent valid termination of the Plans occurs before the confirmation of a plan or ~~plans of~~ reorganization. The PBGC also filed other contingent claims in the bankruptcy case, including contract claims asserted on behalf of the Plans as third-party beneficiaries for the amounts by which Plan assets may be insufficient to pay promised benefits, and claims under section 4062(c) of ERISA, 29 U.S.C. § 1362(c), for certain unfunded "benefit commitments" owed to the trust established under section 4049 of ERISA, 29 U.S.C. § 1349.

imposes a lien for unpaid termination liability, provides that the lien "arises on the date of termination of a plan." 29 U.S.C. § 1368(b). Under section 4048 of ERISA, the date of plan termination is the "date established by the corporation and agreed to by the plan administrator" or the "date established by the court." 29 U.S.C. § 1348(a)(3), (a)(4). Here, since the termination date was January 13, 1987, the PBGC argues that its claim for termination liability first arose six months after the commencement of LTV's bankruptcy proceedings. As for its claim as statutory trustee for due and unpaid contributions to the Plans, the PBGC contends that under section 4062(d) of ERISA it had no statutory responsibility or authority to collect due and unpaid contributions until it was appointed statutory trustee on January 12, 1987, the date on which the consent orders terminating the Plans as of January 13, 1987 were entered. 29 U.S.C. § 1362(d).

LTV does not dispute that LTV Steel's liability to the PBGC did not become due and payable under ERISA until the date of termination. LTV contends, however, that the accrued benefits, for which the PBGC has now—through restoration—reimposed LTV Steel's funding obligations, were accrued or earned by LTV Steel's employees prepetition and thus are attributable to the period pre-dating the Chapter 11 filing. Therefore, LTV argues, the liability to fund such benefits constitutes a prepetition claim and remains a prepetition claim regardless of when it becomes fixed. Recent bankruptcy cases that distinguish between when a claim arises for the purposes of the Code and when a cause of action accrues on a claim under state or federal law support LTV's position.

Consistent with the goals of uniform treatment for creditors and a fresh start for debtors, courts have determined when a claim arises for Code purposes by focusing upon "the time when the acts giving rise to the alleged

liability were performed," since only reference to prepetition acts of the debtor will result in treating liabilities flowing from such acts in an equitable fashion. *In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986); *see also In re Revere Copper and Brass, Inc.*, 29 B.R. 584, 588 (Bankr. S.D.N.Y.), *aff'd*, 32 B.R. 725 (S.D.N.Y. 1983); *In re A.H. Robins Co.*, 63 B.R. at 993; *In re Edge*, 60 B.R. 690, 699-705 (Bankr. M.D. Tenn. 1986). Where the debtor's obligations stem from contractual liability, even a post-petition breach will be treated as giving rise to a prepetition liability where the contract was executed prepetition. *See* 11 U.S.C. § 365 (g)(1); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); *see also In re Ahrens*, 64 B.R. 5, 6-7 (Bankr. E.D. Pa. 1986); *In re William H. Herr, Inc.*, 61 B.R. 252, 253 (Bankr. E.D. Pa. 1986).

In *In re Johns-Manville*, 57 B.R. at 690, the bankruptcy court held that "for federal bankruptcy purposes, a prepetition 'claim' may well encompass a cause of action that, under state law, was not cognizable until after the bankruptcy petition was filed." The court declined to follow the Third Circuit's holding in *Matter of M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) that "the threshold question of when a right to payment arises, absent overriding federal law, 'is to be determined by reference to state law.'" 744 F.2d at 337 (quoting *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161 (1946)). The *Johns-Manville* Court noted other bankruptcy courts' criticism of the *Frenville* decision for its "reliance upon state law to determine if a claim existed against the debtors at the time that the bankruptcy cases were commenced," *In re Yanks*, 49 B.R. 56, 58 (Bankr. S.D. Fla. 1985), and for failing "to distinguish between 'claim' as defined in 11 U.S.C. § 101(4) and a cause of action for indemnity or contribution under state law." *Matter of Baldwin-United Corp.*, 49 B.R. 901, 903

(Bankr. S.D. Ohio 1985). The bankruptcy court also noted the Second Circuit's statement in *In re Baldwin-United Corp. Litig.*, 765 F.2d 343 (2d Cir. 1985), that it has reservations about following *Frenville*: "We are not as certain as the District Court that, if we reached the issue, we would follow *Frenville* and hold the stay inapplicable to Paine-Webber's third-party complaint. The broad definition of 'claim' in the Bankruptcy Code . . . creates a substantial question whether the stay applies to the third-party complaint." *In re Baldwin-United Corp. Litig.*, 765 F.2d at 348 n.4.

Notwithstanding widespread bankruptcy court disapproval of *Frenville*, this and other district courts from this Circuit have held that the issue of when a claim arises cannot always be resolved solely with reference to the Code but sometimes requires an analysis of competing interests behind other federal laws. Thus, for example, in three recent cases our district courts have held that when the EPA's claim for cost recovery and a joint tortfeasor's claim for contribution under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 arise against a debtor in bankruptcy cannot be determined solely with reference to the broad definition of claim in section 101(4) of the Code but requires substantial consideration of the competing interests protected by federal environmental laws. *See, e.g., American Telephone & Telegraph Co. v. Chateaugay Corp.*, No. 87 Civ. 8160, slip op. (S.D.N.Y. April 22, 1988); *In re Combustion Equipment Assocs., Inc.*, 67 B.R. 709 (S.D.N.Y. 1986); *In re Johns-Manville Corp.*, 63 B.R. 600 (S.D.N.Y. 1986). Indeed, the need for material consideration of ERISA provided part of the grounds for the withdrawal of the instant case from the bankruptcy court. *See PBGC v. The LTV Corp.*, slip op. at 11-12 (material consideration of ERISA required to determine when PBGC's claims arise). Therefore, in order to determine the status of the PBGC's claims, this court must consider what acts gave rise to LTV's pen-

sion liabilities, when they occurred, and, finally, whether any competing interests in ERISA require that such liabilities be treated as post-petition claims of the PBGC.

Here, the events that gave rise to the PBGC's claims and that mark them as prepetition were LTV Steel's creation and maintenance of a pension plan that was subject to ERISA's Title IV termination liability provisions and LTV Steel's employees' labor during the years preceding the Chapter 11 filing. The PBGC's right to payment upon termination was, on the petition date, a classic example of a contingent claim—"one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event." *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981). If the extrinsic event occurs post-petition, the contingent claim simply becomes a liquidated one; it, however, is not thereby elevated to the status of a post-petition claim. Here, the extrinsic event was plan termination, which simply fixed LTV's liability to PBGC.[13]

[13] Indeed, the PBGC's reimbursement claim in these cases as statutory guarantor is analogous to the claim of any guarantor or surety that pays post-petition under a guarantee that existed prepetition. As one commentator notes:

> To the extent that the claim of a surety for reimbursement or contribution of payments made after the filing of the case is . . . allowable, such claim is treated as though it were given no higher status than is the claim of the creditor against the debtor. To give the surety better than prepetition status merely because he has made a payment to a prepetition creditor following the filing of the debtor's petition would distort the scheme of the statute with respect to prepetition claims and, when appropriate, post-petition administrative claims. The surety had a contingent claim against the debtor at the time of the commencement of the case. Its becoming fixed after that time in no way changes its status as a prepetition claim.

3 *Collier on Bankruptcy*, ¶ 502.05[2] (15th ed. 1987); *see also Maynard v. Elliott*, 283 U.S. 273, 275 (1931); *Matter of Fuzzy Thurston's Eau Claire Left Guard, Inc.*, 33 B.R. 579, 581 (Bankr. W.D. Wisc. 1983); 11 U.S.C. § 502(e).

The Code's deliberate refusal to distinguish between contingent and mature claims reflects a fundamental bankruptcy policy that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 595, 95th Cong. 2nd Sess. 309 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6266; S. Rep. No. 989, 95th Cong., 2d Sess. 22, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5808. The Code's broad delineation of prepetition claims was intended to embrace contingent claims and avoid the problems that sometimes occurred under the former Bankruptcy Act, when contingent or unliquidated claims were disqualified from sharing in the estate and, equally important from the debtor's point of view, were not discharged. *See In re Johns-Manville*, 57 B.R. at 687.

In support of its argument for post-petition status for its claims, the PBGC cites statutory provisions in ERISA that make the PBGC's claims for termination liability and for due and unpaid minimum funding contributions "due and payable" as of the termination date. *See* 29 U.S.C. § 1362(b)(2)(A), (d). Relying on these provisions, the PBGC argues that its claims against LTV are based upon a post-petition event—termination—and, therefore, arose post-petition. Termination, however, merely made the PBGC's contingent claims fixed, that is, non-contingent. The fact that the PBGC may not proceed against LTV Steel on its contingent claims until termination occurs does not distinguish pension liability claims from any other contingent claims that are triggered by a post-petition event. Termination alone could not convert the PBGC's contingent prepetition claims into post-petition claims.[14]

[14] The cases cited by the PBGC in support of its contention that its claims against LTV arose post-petition are distinguishable. In each case, to the extent that a claim was found to have arisen post-petition, the court found that the claim arose upon the post-petition conduct of the debtor, not the creditor. *See, e.g., Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992 (5th Cir. 1985) (claims with respect to a fire at the debtor's property two days after Chapter 11 petition was filed held to be post-petition); *In re Continental Air Lines, Inc.*, 61 B.R. 758 (S.D. Tex. 1986) (action brought by minority shareholders of corporation which was target of debtor's post-petition takeover attempt was found to be post-petition action); *In re Newman Companies of Wisconsin, Inc.*, 45 B.R. 308 (Bankr. E.D. Wis. 1985) (declaratory judgment action by former employee of debtor to test validity of a noncompetition clause with respect to debtor's post-petition business activities was allowed under 28 U.S.C. § 959(a) which permits suit against debtor with respect to post-petition business activities); *Turner Broadcasting System, Inc. v. Sanyo Elec., Inc.*, 33 B.R. 996 (N.D. Ga. 1983), *aff'd mem. sub nom. Turner Broadcasting v. Rubin*, 742 F.2d 1465 (11th Cir. 1984) (debtor's breach of post-petition contract resulted in post-petition claim.) Here, as discussed above, the service of LTV Steel's employees during the years preceding the Chapter 11 filing gave rise to LTV Steel's pension liabilities, and hence to the PBGC's claims.

The PBGC has failed to raise any overriding policy objectives of ERISA that would warrant a departure from the well-settled bankruptcy rule that contingent, unmatured claims be deemed prepetition claims subject to the automatic stay and dischargeable pursuant to a plan of reorganization. The PBGC has not cited to legislative history or provisions of ERISA that suggest that a debtor's minimum funding obligations and termination liability are entitled to post-petition status in the context of a bankruptcy proceeding. Indeed, the 1987 PPA amendments to ERISA, which increased the PBGC's claim for termination liability from 75 to 100% of all unfunded benefits, indicate that Congress chose to improve the PBGC's claim by increasing it, without awarding it post-petition treatment in bankruptcy. The court is not aware of any proposals during consideration of the 1987 amendments that would have afforded post-treatment to the PBGC's claims.

Finally, LTV Steel's liabilities, and the PBGC's claims, are analogous to ERISA claims for "withdrawal liability"

owed to multiemployer plans.[15] Courts considering the status of such claims uniformly have held that withdrawal liability is based on vested benefits relating to prepetition services and that claims for withdrawal liability are prepetition claims. *See Trustees of the Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986); *In re Great Northeastern Lumber & Millwork Corp.*, 64 B.R. 426 (Bankr. E.D. Pa. 1986); *Amalgamated Ins. Fund v. William B. Kessler, Inc.*, 55 B.R. 735 (S.D.N.Y. 1985); *In re Silver Wheel Freightlines, Inc.*, 57 B.R. 476 (Bankr. D. Or. 1985). In *McFarlin's*, the Court of Appeals for this Circuit reasoned that the liability to a pension plan to fund plan benefits that were earned through prepetition services is not a post-petition expense of administration, even though the liability matured post-petition upon plan withdrawal. Since the "consideration supporting [the] . . . liability" was the employees' prepetition labor, the consideration was "attributable to the period pre-dating the filing of the Chapter 11 petition" and the liability was classified as a general unsecured claim. *Id.* at 103. The Honorable Walter R. Mansfield, rejecting an argument similar to that made by the PBGC here, stated that a "debt is not entitled to priority [*i.e.*, post-petition administrative status] simply because the right to payment arises" post-petition. *Id.* at 101. Rather, an obligation, he said, is entitled to administrative post-petition status "only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business." *Id.* (quoting *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976)).

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[15] Under sections 4201 and 4211 of ERISA, when an individual employer withdraws from a multiemployer pension plan, the withdrawing employer must pay to the plan an amount equal to the employer's *pro rata* share of the total unfunded vested benefits plan as of the date of termination. *See* 29 U.S.C. §§ 1381, 1391.

In an effort to distinguish the instant case from *McFarlin's* and other withdrawal liability cases, the PBGC suggests that those decisions turned on a finding that withdrawal liability was not a necessary cost of preserving the estate and that the denial of administrative priority does not necessarily mean that the claim arose prepetition. The rationale of the withdrawal liability cases, however, is broader than the narrow issues there decided. As the court stated in *In re Pulaski Highway Express, Inc.*, 57 B.R. 502 (Bankr. M.D. Tenn. 1986), a prepetition claim for pension liability remains a prepetition claim regardless of when it becomes fixed or matured in the context of multiemployer pension plan withdrawal liability:

> Although withdrawal liability may be triggered by a post-petition event, the conclusion that it then constitutes a "post-petition claim" for bankruptcy purposes is unsupported by applicable law and is inconsistent with important bankruptcy polices. In substance, the claim is an obligation to ensure the payment of pension benefits which have previously accrued but are not payable until a future date. . . . The liability, i.e., the "right to payment," is incurred when the employee benefits become nonforfeitable. An employer may meet this obligation either by continuing normal operations and making the required regular contributions into the plan, or by withdrawing from the plan and paying the withdrawal liability. . . . The liability may be unliquidated and the amount may be contingent upon withdrawal or whether the vested benefits are unfunded, but such uncertainties do not defeat the existence of pre-petition claims for benefits which accrued prior to withdrawal, which stem from pre-petition events and conduct and which were nonforfeitable and fully vested prior to filing.

* * *

> The withdrawal liability attributable to pre-petition labor is generically indistinguishable from the rights acquired by any pre-petition creditor who provides contractual services or goods to the debtor, accrues a right to payment from the debtor, but is not paid as of the date of the petition.

In re Pulaski Highway, 57 B.R. at 507-508 (citations omitted).

The PBGC has not offered a compelling reason why the post-petition termination of a pension plan should displace the actual service of employee-beneficiaries as the "acts" that give rise to a sponsor's pension liabilities. Based upon the foregoing consideration of the policies of the Code and of ERISA, the objectives of the Code will be furthered and those of ERISA not frustrated if LTV's pension liabilities to the PBGC are treated as prepetition claims.

III. *Restoration Does Not Violate the Automatic Stay*

The PBGC contends that neither restoration nor the Enforcement Action are actions to recover on its claims against LTV Steel. Neither the Restoration Notice nor the complaint in the Enforcement Action demands payment on the PBGC's claims against LTV Steel, and neither will result in any payments directly to the PBGC. The PBGC asserts that because the Restoration Notice restored the Plans to their pretermination status, the PBGC, post-restoration, is in the same position *vis-a-vis* LTV as it was before the Plans terminated on January 13, 1987.

LTV argues that the PBGC's contentions ignore the practical effects of its acts. The Restoration Notice instructed LTV Steel that the Plans were ongoing "for all purposes including . . . minimum funding contributions." Thus, LTV argues, although restoration will not effect a direct recovery by the PBGC on its prepetition claims,

restoration will (1) make LTV immediately liable for due and unpaid minimum funding contributions, (2) make LTV liable for currently accruing minimum funding contributions, and (3) result in the ongoing accrual by LTV Steel employees of pension benefits under the Plans. Further, LTV contends that, in the event that the Plans are reterminated at some future date, restoration will have served as the predicate for a substantial increase in the PBGC's termination liability claims against LTV under the 1987 PPA amendments to ERISA.

Focusing on what may prove to be the practical effects of the PBGC's restoration decision in this case, as LTV urges this court to do, could lead to an erroneous conclusion as to whether restoration, when properly effected, violates the automatic stay as a matter of law. Here, LTV has argued that the relief sought by the PBGC in its Enforcement Action—the enforcement of the Restoration Notice compelling minimum funding payments—exceeds the PBGC's authority under Title IV. LTV has also argued that if restoration is upheld, the Plans will have to be reterminated, at which time the PBGC can be expected to contend that it is entitled, under the 1987 amendments to ERISA, to increase its termination liability claim against LTV. However, the fact that the PBGC may have erred in restoring the Plans or that it may have requested relief beyond the scope of its authority does not necessarily lead to the acceptance of LTV's argument that restoration must always be subsumed by the Code and subordinated to the goals of reorganization. These considerations underlie the conclusions concerning the direct effects of restoration under sections 362(a)(1), (a)(3), and (a)(6) of the Code.

Sections 362(a)(1) and (a)(6) of the Code's stay provisions bar all acts or proceedings to collect, assess or recover prepetition claims. Restoration returns to LTV Steel the immediate obligation to contribute to the Plans the minimum funding amounts required by ERISA

for the plan years 1984-1986 and imposes on LTV a continuing obligation to make minimum funding contributions for the years 1987 forward. Whether LTV will be required to make these payments, however, is not determined by the simple act of restoration. In order to compel payment for past due minimum funding contributions, the Department of Labor, not the PBGC, is required to institute enforcement proceedings under Title I of ERISA. *See* 29 U.S.C. § 1132(a). Whether an enforcement action by the Labor Department would be barred by the automatic stay or whether the bankruptcy court would lift the stay for such an action are issues not now before this court.[16] It suffices to note that restoration *per se* simply reimposes on the debtor the same minimum funding obligations for the years 1984-1986 that existed prior to termination and reinstates LTV

[16] Restoration in a bankruptcy proceeding does not mean that minimum funding payments, otherwise payable on account of unfunded prepetition benefits, must be paid, because the provisions of Title I of ERISA, which set forth the minimum funding obligations, *see* 29 U.S.C. § 1082, are expressly subordinated to other non-ERISA federal laws, like the Code. Section 514(d) of ERISA, in relevant part, provides that "[n]othing in this title [Title I] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under such law." This section has been cited for the proposition that "ERISA should not be interpreted as displacing any pre-existing federal legislation." *See Bonin v. American Airlines, Inc.*, 621 F.2d 635 (5th Cir. 1980) (Railway Labor Act), *on remand*, 562 F. Supp. 896 (N.D.Tex. 1983), *aff'd without op.*, 738 F.2d 435 (5th Cir. 1984), *cert. denied*, 471 U.S. 1005 (1985).

On the other hand, the PBGC has offered authority for the proposition that payments for minimum funding contributions by a plan sponsor in Chapter 11 may be entitled to administrative expense priority, pursuant to sections 503(b)(1) and 507 of the Code, as actual and necessary costs or expenses of preserving the estate. *See Columbia Packing Co. v. PBGC*, No. 85-2241-C, slip op. at 5-9 (D. Mass. Jan. 6, 1988). Because an application for administrative expense priority status for LTV Steel's minimum funding payments is not before this court, whether *Columbia Packing* should be followed need not be decided at this time.

Steel's ongoing minimum funding obligations for plans that have been restored to their pretermination status. Restoring the Plans to their pretermination status does not result in any direct payments to the PBGC or in any direct payments to the Plans and, therefore, does not result in a recovery on claims for past due minimum funding contributions in violation of sections 362(a)(1) and (a)(6).[17] Similarly, because the PBGC lacks the authority to compel minimum funding payments, its decision to restore the Plans does not directly result in the PBGC's exercise of control over LTV's assets by the PBGC in violation of section 362(a)(3).

LTV advances a second theory under which restoration will result in the exercise of control over property of the estate. If restoration is made effective as of the January 13, 1987 termination date, LTV Steel's employees will continue to accrue service benefits from that date forward. LTV equates the compulsory accrual of liabilities under the Plans with the exercise of control over property of the debtor which is barred by section 362(a)(3). However, the scope of section 362(a)(3) does not by its terms encompass such indirect effects of restoration.

The purpose of section 362(a)(3) "is to protect the estate from *direct* action taken by creditors against a debtor's personal or real property, and to prevent an uncontrolled scramble to liquidate the estate." *In re Continental Airlines, Inc.*, 61 B.R. 758, 778 (S.D. Tex. 1986) (emphasis added). Cases interpreting section 362(a)(3), therefore, "have generally involved direct action taken by creditors against a debtor's personal or real property." *Id.* at 779; *see, e.g.*, *In re 48th Street Steakhouse, Inc.*, 61 B.R. 182, 187 (Bankr. S.D.N.Y. 1986), *aff'd*, 77 B.R.

[17] It must be noted that today's decision does not resolve whether an action by the Labor Department to collect due and unpaid minimum funding contributions to the Plans would constitute an action to recover on the PBGC's contingent claims against LTV Steel.

409 (S.D.N.Y.), *aff'd*, 835 F.2d 427 (2d Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1598 (1988) (cancellation of debtor's lease); *In re Tel-A-Communications Consultants, Inc.*, 50 B.R. 250 (Bankr. D. Conn. 1985) (repossession of debtor's vehicle); *Proyectos Electronicos, S.A. v. Alper*, 37 B.R. 931, 932 (E.D. Pa. 1983) (recovery of purchased goods from debtor's estate). Courts, moreover, "have clearly distinguished between the entry of judgment, and attempts to enforce a judgment against property of the estate in determining whether a violation of subsection 362(a)(3) has occurred." *In re Continental Airlines*, 61 B.R. at 779; *see, e.g., Kommanditselskab Supertrans v. OCC Shipping, Inc.*, 79 B.R. 534 (S.D.N.Y. 1987) (Section 362(a)(3) stays enforcement of judgment against debtor's property).

Restoration does not constitute direct action against LTV's property or assets. Restoration simply reimposes on LTV Steel the obligation to provide pension benefits for employees. This obligation is an ordinary cost of doing business and one that LTV Steel has readily accepted under the 1987 CBA Plans, albeit outside the regulatory framework of ERISA. However, contrary to LTV Steel's assumption, termination did not remove the company and its Plans from ERISA's regulatory framework. The PBGC's authority to restore terminated pension plans to their pretermination status necessarily implies that termination does not erase a plan sponsor's obligations under ERISA but rather suspends certain obligations and transforms others into liability claims. For example, although termination relieves the plan sponsor of its obligation to make minimum funding contributions directly to the Plans, section 4062 of ERISA recasts the sponsor's minimum funding obligations as liabilities directly to the PBGC.

As the bankruptcy court stated in *In re Beker Indus. Corp.*, 57 B.R. 611, 624 (Bankr. S.D.N.Y. 1986), "the Code does not change the business and regulatory environment in which a debtor operates." Although LTV Steel seeks to minimize the application of ERISA to its post-petition pension activities, ERISA's restoration provision compels the conclusion that an employer who funds a qualified ongoing pension plan may under appropriate circumstances be required to resume its statutory obligations for a plan that has been terminated. Therefore, the continued accrual of employee pension benefits results from maintaining a qualified pension plan under ERISA. The liability that LTV Steel incurs as such benefits accrue does not transfer or exercise control over LTV Steel's property.

LTV's final attempt to place restoration within the category of actions barred by the automatic stay is premised upon the assumption that retermination of the Plans is inevitable. Because Plan liabilities exceed Plan assets, if, upon restoration, LTV is not able to make current minimum funding contributions to the Plans, the Plans will ultimately be financially exhausted, and the PBGC will be compelled to terminate them. If the Plans are not restored, the amount of the PBGC's termination liability claim in this case would equal 75% of the unfunded guaranteed benefits. But if the Plans were restored and then reterminated, the PBGC can be expected to claim reimbursement for 100% of all unfunded benefits under the 1987 PPA amendments. Thus, LTV argues, even if the PBGC is now seeking to restore the Plans for the sole purposes of allowing full retirement benefits (not just guaranteed benefits) to be paid out of Plan assets and allowing active workers to continue to accrue benefits (as was the case immediately prior to termination), without compelling minimum funding payments, restoration violates the automatic stay because its only lasting effect would be to enable the PBGC to argue upon the inevitable retermination of the Plans that it is entitled to assess an increase in its claim for termination liability under ERISA. LTV has estimated,

and the PBGC does not dispute, that the 1987 PPA amendments to ERISA could increase the PBGC's claim for termination liability by approximately $800 million upon retermination.

Based upon these assumptions concerning retermination, LTV suggests that restoration should be viewed as an act by the PBGC to "assess" an increase in its claims or to "recover" more on its prepetition claims than it would otherwise be entitled to recover in violation of sections 326(a)(1) and (a)(6). However, the automatic stay does not apply to speculation about recovery on an attenuated future liability. First, it remains to be seen whether restoration can be upheld on any of the grounds articulated by the PBGC in the Restoration Notice. Second, if restoration is upheld and retermination proves to be inevitable, substantial questions will be raised as to (a) whether the period between the termination date and the retermination date should be accounted for in assessing LTV's liabilities to the PBGC and (b) whether the PBGC will be permitted to invoke the benefits of the 1987 PPA amendments to enhance its claims against LTV. Retermination is replete with unanswered questions concerning the respective rights of LTV and the PBGC. Therefore, the prospect of future retermination of the Plans cannot mark restoration as an act to increase a prepetition claim in violation of section 362(a)(6).[18]

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[18] Thus, this case can be distinguished from *In re Texaco Inc.*, 73 B.R. 960 (Bankr. S.D.N.Y. 1987), where certain noteholders sought to lift the stay in order to serve a notice of acceleration upon the debtor, Texaco Capital, Inc., and thus lock into a higher rate of interest under the terms of their notes. There, because the notice would satisfy a "condition precedent" for asserting a larger claim, the court held that it would disrupt the *status quo* and, thus, violate the stay by permitting discreet creditors to advance their interest during the case. *Id.* The court, therefore, refused to lift the stay. In *Texaco* even though the movants had not sought immediately to collect amounts due on certain notes, there was no dispute that service of a notice of acceleration would directly increase their claims. Here, by contrast, whether restoration would lead to retermination and what the consequences of retermination would be are issues that mercifully are not appropriate for present adjudication.

In sum, section 362(a) prohibits only action taken "directly against the property of the debtor's bankrupt estate." *In re Nashville White Trucks, Inc.*, 731 F.2d 376, 378 (6th Cir. 1984). The PBGC's authority under section 4047 of ERISA is limited to restoring the Plans to their pretermination status and thereby converting the PBGC's claims for minimum funding contributions and for termination liability back to contingent claims against LTV Steel and reinstating LTV Steel's ongoing statutory obligations as a sponsor of qualified plans under ERISA. Restoration alone cannot result in immediate involuntary payments from LTV's assets to meet minimum funding requirements, nor can restoration cause a direct change in the possession or control of any of LTV's assets. Finally, whether restoration will serve as a condition precedent to an ultimate increase in the PBGC's claims against LTV is a question not yet ripe for resolution. Therefore, neither restoration nor the Enforcement Action violate the automatic stay provisions of the Code.

IV. *Section 362(b)(4) of the Code Exempts Restoration*

Even if restoration could be deemed to constitute a violation of the automatic stay, the PBGC's decision to restore the Plans falls within the exemption from the automatic stay found in section 362(b)(4) of the Code for police or regulatory actions taken to protect the public health and welfare. The stay provisions of section 362(a) do not "change the business and regulatory environment in which a debtor operates," *In re Beker Indus. Corp.*, 57 B.R. at 624, or give a debtor "*carte blanche* to ignore non-bankruptcy law," *Midlantic Nat'l*

Bank v. New Jersey Dep't of Environmental Protection, 474 U.S. 494, 502 (1986). Congress made this clear by "expressly provid[ing] that the automatic stay provisions of the Bankruptcy Code do not apply when the government is seeking to enforce its police or regulatory power." *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1086 (3d Cir. 1987). Thus, section 362 (b)(4) of the Code provides that the filing of a bankruptcy petition does not operate as a stay:

> under subsection (a)(1) of [section 362] of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362(b)(4).

Leaving aside for the moment questions as to the appropriateness of the procedures followed by the PBGC in restoring the Plans [19] and as to the merits of the restoration decision, there is no dispute that ERISA expressly provides for restoration as an act by the PBGC to carry out its regulatory authority under Title IV. A primary purpose of ERISA as a whole is "the protection of individual pension rights." H.R. Rep. No. 533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639. The detailed findings on which

[19] LTV objects to the sending of the Restoration Notice announcing that the Plans had been restored as an administrative *fait accompli* and to the relief requested in the Enforcement Action—minimum funding contributions—as being outside the PBGC's regulatory authority under Title IV. As discussed above, to penalize the PBGC for overreaching its express statutory authority and thereby to preclude judicial consideration of restoration as a regulatory act would serve neither the interests of the parties nor resolve the consequences of restoration, when properly effected. Without guidance from prior administrative practice or court decisions construing the restoration provision, the PBGC moved through uncharted waters as it carried out what it believed to be its statutory mandate. Whatever errors it may have made in that process are within the powers of the court to correct.

ERISA is predicated show that the statute was enacted to "provide for the general welfare" by protecting the "continued well-being and security of millions of employees" who participate in pension plans. 29 U.S.C. § 1001(a). Congress found that "owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . . ." *Id.; see Nachman Corp. v. PBGC*, 446 U.S. 359, 362 (1980). Therefore, one of the principal purposes of Title IV was "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984). "[T]o prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated," *Nachman Corp. v. PBGC*, 446 U.S. at 374, Congress established the pension plan termination insurance program in Title IV of ERISA. SEPPAA strengthened that program for single-employer pension plans like the plans in this case.

Title IV establishes the PBGC as a corporation administered by a board of directors and endows it with certain regulatory, investigatory and regulatory powers with respect to the provisions of Title IV. 29 U.S.C. §§ 1302 (b)(3), 1303(a)-(e). The PBGC's regulatory powers under Title IV include the express authority to "restore" terminated plans to their pretermination status. Section 4047 of ERISA provides in relevant part:

> In the case of a plan which has been terminated under section 4041 or 4042, the [PBGC] is authorized in any such case in which the [PBGC] determines such action to be appropriate and consistent with its duties under this title to restore the plan to its pretermination status, including, but not limited to, the

> transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347.

The PBGC contends that restoration serves each of the purposes of Title IV. As set forth in section 4002(a) of ERISA, those purposes are: (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants; (2) to provide for the timely and uninterrupted payment of benefits under plans to which Title IV applies; and (3) to maintain premiums at the lowest level consistent with the PBGC's obligations under the statute. 29 U.S.C. § 1302(a)(1)-(3). Congress further declared in SEPPAA that the policy of Title IV is, among other things, (1) to increase the likelihood that participants under single-employer defined pension plans will receive their full benefits and (2) to provide for transfer of unfunded pension liabilities to the termination insurance system only in cases of severe hardship. *See* 29 U.S.C. § 1001b(3), (4). Whether or not restoration can ultimately be sustained on the grounds that it furthers the purposes of Title IV, there is a sufficient relationship between the potential effects of restoration and the policies of Title IV to qualify restoration as a regulatory act. For example, when properly effected, restoration can ensure that participants and beneficiaries will receive their full benefits and continue to accrue benefits at pretermination levels in accordance with the terms of the restored plans. Similarly, restoring plans to a financially sound employer limits the transfer of unfunded pension liabilities to the pension insurance program to cases of severe hardship. For the same reason, by relieving the financial strain on the PBGC, restoration serves to maintain premiums at a reasonable level.

LTV argues, however, that even if the Enforcement Action could be deemed within the scope of the PBGC's

regulatory and enforcement powers under Title IV of ERISA, the exclusion for regulatory acts does not apply because the primary purpose of the PBGC's act of restoring the Plans was the protection of a pecuniary interest. The pecuniary purpose test for acts by governmental agencies stems from the legislative history of the Code which provides, in part, that section 362(b)(4):

> is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

124 Cong. Rec. H 11089 (Sept. 28, 1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 6436, 6444-45 (statement of Rep. Edwards).

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299; S. Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5838.

In support of their respective positions, LTV has cited numerous cases holding that governmental actions intended primarily to protect a pecuniary interest are not exempted by section 362(b)(4)[20] and the PBGC has cited

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[20] *See, e.g., In re State of Missouri*, 647 F.2d 768, 775-76 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) (state regulation of

almost as many holding that governmental actions taken in the public interest fall within the exemption, notwithstanding some incidental financial benefit.[21] As the bankruptcy court observed in *In re Beker Indus. Corp.*, the

grain storage transactions and grain warehouses related to the state's pecuniary interest in, and conflicted with, bankruptcy court's control over estate property and was not witihn the 362(b)(4) exception); *In re Organized Maintenance, Inc.*, 47 B.R. 791, 795 (Bankr. E.D.N.Y. 1985), *vacated on other grounds*, 69 B.R. 298 (E.D.N.Y. 1987) (Department of Labor administrative proceeding for employee wages and fringe benefits not excepted by 362(b)(4) because the government was trying "to protect the pecuniary interest [of the contractor's employees] in property of the estate"); *In re Greenwald*, 34 B.R. 954, 957 (Bankr. S.D.N.Y. 1983) (Department of Health stayed from pursuing administrative proceedings; "Manifestly, the Commissioner [sought] to protect a pecuniary interest in property of the debtor to the extent of a claim for medicaid overpayments"); *In re Geffken*, 43 B.R. 697, 701 (Bankr. N.D. Ohio 1984) (state's attempt to enjoin further business operations of debtor for failure to pay premiums to worker's compensation fund held subject to Section 362(b)(4) since statute enacted for primary purpose of enforcing state's pecuniary interest); *In re Rath Packing Co.*, 35 B.R. 615, 622 (Bankr. N.D. Iowa 1983) (state's attempt to revoke debtor's self insurance exemption pursuant to worker's compensation law subject to Section 362(b)(4) since statute "although regulatory in nature, primarily relate[s] to the protection of the pecuniary interest in the debtor's property").

[21] *See, e.g., EEOC v. Rath Packing Co.*, 787 F.2d 318, 324-25 (8th Cir.), *cert. denied*, 107 S. Ct. 307 (1986) (stay inapplicable to EEOC action to enforce Title VII because action, although brought for the benefit of specific individuals, is more broadly aimed at preventing harm to the public); *Donovan v. Porter*, 584 F. Supp. 202, 207 (D. Md. 1984) (ERISA action by Secretary of Labor against plan fiduciaries to enforce provisions of Title I and assess a penalty for violations of those provisions "clearly the type of regulatory action Congress had in mind when it developed the exceptions to the automatic stay provision"); *In re Lawson Burich Assocs.*, 31 B.R. 604, 612 (S.D.N.Y. 1983) (financial interests do not preclude application of section 362(b)(4) where regulation clearly is in the public interest); *Donovan v. TMC Indus., Ltd.*, 20 B.R. 997, 1006 (N.D. Ga. 1982) (to allow bankruptcy petition to preempt relief available under Fair Labor Standards Act to protect health and welfare of workers "is unimaginable").

cases construing section 362(b)(4) and the pecuniary purpose test "do not admit of easy classification." *In re Beker Indus.*, 57 B.R. at 629 (comparing cases); *see also In re Lawson Burich Assocs., Inc.*, 31 B.R. 604, 611 (S.D.N.Y. 1983) (discussing cases). In any event, in seeking the line between governmental actions to protect a pecuniary interest and those to protect the public health and safety, courts have drawn distinctions that are inappropriate for the instant case. In enacting Title IV, Congress recognized that the financial security and the well-being of the employees whose pensions Title IV insures are virtually inseparable interests. *See* 29 U.S.C. § 1001(a). Thus, as the court astutely observed in *In re Century Brass Products, Inc.*, No. 85 Civ. 585, slip op. (D. Conn. Nov. 24, 1986), "[i]t is hard to imagine any action taken by the PBGC that did not involve its pecuniary interest." *In re Century Brass*, slip op. at 11. Unlike employment discrimination or environmental laws, which arguably have a more direct impact on the nonmonetary aspect of the public health and welfare, Title IV of ERISA provides for the health and welfare of employees by securing their pecuniary interests. In carrying out its statutory obligations under Title IV, the PBGC is, therefore, authorized to take certain actions to protect itself from unreasonable or unnecessary pecuniary loss. Thus, section 4042 of Title IV permits the PBGC to terminate pension plans where minimum funding standards are not met, where benefits are not paid when due, where a "reportable event," such as bankruptcy, has occurred, or where "the possible long run loss of the [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a). Congress intended to protect the PBGC from having to stand by and watch while "a bankrupt employer bleeds itself to death," and, therefore, expressly exempted termination proceedings from the automatic stay. *In re Century Brass*, slip op. at 11; *see* 29 U.S.C. § 1342(e).

Although Congress did not expressly exempt restoration proceedings from the automatic stay, the regulatory policies and interests that the PBGC seeks to further by restoring a plan are similar to those it protects when it terminates a plan. The PBGC's own pecuniary interests are simply surrogates for the pecuniary interests of millions of American workers whose pensions it insures. Therefore, where, as here, the PBGC exercises it statutory authority in a manner that it believes furthers such ERISA policies as maintaining premium costs at reasonable levels so as to encourage the continuation and maintenance of voluntary private pension plans and permitting termination only in cases of severe hardship, the PBGC acts on behalf of the well-being of millions of American workers whose future ability to provide food, clothing, and shelter for themselves and their families depends on the security of their pensions.[22]

[22] Here, the USWA, the PBGC's most immediate constitutency, has filed a brief as amicus curiae in which it argues that the 1987 CBA Plans do not abuse Title IV and cannot serve as a basis for the PBGC's restoration decision. Thus, on at least one issue the USWA has taken a position contrary to the PBGC, although the USWA has not taken a position with respect to the larger issue of the PBGC's restoration authority. On the other hand, Solidarity USA, Inc., representing certain LTV retirees who do not believe their interests are adequately represented by the USWA, has filed a brief in support of the PBGC's decision to restore the Plans. Solidarity USA argues that LTV Steel should be required to pay retirees their full benefits unless LTV can demonstrate that it would be a severe hardship to do so. That the USWA, after collective bargaining for what it considered to be the most complete benefit arrangement it could achieve for its members under the circumstances, has adopted a position that puts it in direct conflict with the PBGC does not call into question the legitimacy of the PBGC's claim to act on behalf of America's workers. In any case in which it exercises its regulatory authority under Title IV, the PBGC is required to act in a manner consistent with its statutory duties which encompass the well-being of all employees whose pensions are insured under Title IV.

The PBGC proceeded with restoration and the Enforcement Action on the belief that its acts were exempt from the operation of the automatic stay. Where a governmental unit determines that its police power or regulatory proceeding is exempt from the automatic stay under section 362(b)(4), it is not required to petition the bankruptcy court for relief from the stay prior to commencing or continuing its proceeding. *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 939 (6th Cir. 1986). Totally aside from the merits of the restoration, restoration is exempt from the stay under section 362(b)(4) as an act to enforce the PBGC's regulatory authority in furtherance of the public health and welfare.

The Enforcement Action

The central issue in the PBGC's Enforcement Action is the validity of the agency's determination to restore the Plans. The PBGC's complaint states simply that, pursuant to authority granted in section 4047 of ERISA, 29 U.S.C. § 1347, the PBGC restored the Plans and that LTV Steel has refused to comply with the restoration. The complaint seeks an order directing LTV Steel to comply with the Restoration Notice by operating the Plans as ongoing pension plans. This court has jurisdiction under section 4003(e) of ERISA, 29 U.S.C. § 1303(e).[23] Although the PBGC has initiated judicial reveiw by these proceedings, the restoration decision constitutes final agency action; therefore, judicial review of that agency decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* *Cf. Sierra*

[23] Under section 4003(e)(1), 29 U.S.C. § 1303(e)(1), the PBGC is authorized to bring "[c]ivil actions . . . for appropriate relief, legal or equitable or both, to enforce the provisions of [Title IV]." Similarly, section 4003(f)(1) of ERISA, 29 U.S.C. § 1343(f)(1), provides that "any person who is . . . adversely affected by any action of the [PBGC] with respect to a plan in which such person has an interest . . . may bring an action against the [PBGC] for appropriate equitable relief in the [district court]."

Club v. United States Army Corps of Eng'rs, 772 F.2d 1043 (2d Cir. 1985) (where judicial review not expressly provided under agency's enabling statute, review is under APA).

V. *The Scope of Review*

On the PBGC's motion for summary judgment, the appropriate standard for relief is whether the PBGC's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* 5 U.S.C. § 706(2)(A).[24] Judicial review on the instant motion will be limited to an examination of the PBGC Record which documents the agency's decision to restore the Plans. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978).

Summary judgment is to be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Where, as here, the case involves review of agency action, the material facts are those set forth in the administrative record. *Milton v. Harris*, 616 F.2d 968, 975 (7th Cir. 1980); *see Camp v. Pitts*, 411 U.S. 138, 142-43

[24] Since Title IV does not expressly require the PBGC to hold a hearing or make formal findings pursuant to a hearing record pursuant to 5 U.S.C. §§ 554, 556, and 557, the proper standard for judicial review of the PBGC's decision is not the "substantial evidence" test which is appropriate when reviewing findings made on a hearing record. *See* 5 U.S.C. § 706(2)(E). LTV argues that because the restoration decision was "adjudicatory in nature and the [PBGC's] factfinding procedures [were] inadequate," *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *de novo* review is required to determine whether the PBGC's decision was "unwarranted by the facts." *See* 5 U.S.C. § 706(2)(F). However, on the instant motion for summary judgment, a preliminary review of the PBGC's acts and procedures is required to determine whether the standards for *de novo* review have been satisfied.

(1973). In such a case, "[t]he task of the reviewing court is to apply the appropriate APA standard for review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light v. Lorion*, 470 U.S. at 743-44. The validity of the agency's action must "stand or fall" on that record. *Camp v. Pitts*, 411 U.S. at 143; *see also Vermont Yankee*, 435 U.S. at 549. That determination is purely a question of law.

Judicial review of agency action under the "arbitrary and capricious" standard mandates a searching inquiry into the facts and their relationship to the articulated basis for an agency's action. After satisfying itself that the agency has acted within the scope of its authority, the court must engage in a "thorough, probing, in-depth" review to determine whether the agency's decision-making process was reasoned, took into account all relevant policies and information, and reached a result consistent with congressional intent. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416-17 (1971); *Sierra Club v. United States Army Corps of Eng'rs*, 772 F.2d at 1051. A reviewing court must determine whether the agency's stated explanation for its action is "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). As the Supreme Court held in *State Farm*:

> [n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43. While a court may not substitute its own judgment for that of the agency, it similarly may "not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

Among the matters subject to review is whether an agency has given appropriate consideration to competing policies if its actions may implicate a national policy beyond its area of expertise. An agency must be cognizant of any possible conflict and must adopt narrowly drawn remedies in a manner that will accommodate that national policy. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172-74 (1962) (where agency's lack of expertise and encroachment into areas beyond its jurisdiction contravene national policy, choice of "sweeping relief" inappropriate where "more precise and narrowly drawn" remedy available); *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2, 1147-50 (D.C. Cir. 1974) (where agency action encroaches upon or compels consideration of federal policies beyond the expertise of the agency, the agency must be alert to and must minimize any conflict).

Finally, the court must examine the agency's procedural approach to determine whether it was responsible and consistent with its statutory purpose. Under the arbitrary and capricious standard, "[e]ven if the court concludes that an agency's findings are supported by substantial evidence, it may nonetheless find the procedures used to reach a final determination 'reflect arbitrary and capricious action.'" *O'Connor v. Heckler*, 613 F. Supp. 1043, 1046 (S.D.N.Y. 1985), (quoting *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. at 284); *accord United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 526 (D.C. Cir. 1978) (under arbitrary and capricious standard, "the court must examine the procedures employed by the agency in reaching its decision to ensure that these procedures comply with applicable statutory and constitutional requirements"); *see*

also Overton Park, 401 U.S. at 417 (under arbitrary and capricious standard, "[t]he final inquiry is whether the Secretary's action followed the necessary procedural requirements").

The PBGC's Restoration Notice informed LTV Steel that restoration was appropriate and consistent with its duties under Title IV of ERISA. The PBGC's decision was based upon three principal findings: (1) LTV Steel had abused the pension plan termination insurance program by establishing follow-on plans that essentially continued the terminated Plans, with the PBGC picking up much of the cost; (2) the financial condition of LTV Steel had substantially improved since the Plans were terminated; and (3) LTV Steel had demonstrated its willingness to fund retirement programs. The scope of the PBGC's restoration authority and the legal and factual sufficiency of the grounds asserted for restoration will be determined below.

VI. *The PBGC's Restoration Authority*

To determine whether the PBGC has the authority to restore terminated plans to their pretermination status, reference must first be made to the language of the statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Section 4047 of ERISA provides, in part:

> In the case of a plan which has been terminated under section 4041 or 4042, the [PBGC] is authorized in any such case in which the [PBGC] determines such action to be appropriate and consistent with its duties under [Title IV], to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347. This provision contains little in the way of restrictive language. Section 4047 does not on

its face limit the PBGC's ability to restore plans during an ongoing bankruptcy case, nor does it require that the PBGC apply to the district court for a decree adjudicating that the plan be restored. *Cf.* 29 U.S.C. § 1341(c)(2)(B)(ii) (bankruptcy court approval required for distress termination), § 1342(c) (court order required for involuntary termination by PBGC). Indeed, section 4047 provides that the "transfer to the employer or a plan administrator of control of . . . the remaining assets and liabilities of the plan" is an appropriate means for restoring a plan. If Congress had intended that such direct action be preceded by application to a district court, it surely could have so provided in the statute.[25]

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[25] The legislative history of section 4047 offers little guidance as to the intended scope of the PBGC's restoration authority. The House Conference Report provides:

> Restoration of plans.
>
> Neither the House bill nor the Senate amendment had any specific provision that procedures against a plan in the termination phase might be abandoned by the [PBGC] if the employer and plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable.
>
> Under the conference substitute, the [PBGC] may cease any termination activities and do what it can to restore the plan to its former status. As a result, a terminated plan being operated by a trustee as a wasting trust may be restored if, during the period of its operation by the trustee, experience gains [sic] or increased funding make it sufficiently solvent. The [PBGC] may, when appropriate, transfer to the employer or plan administrator part or all of the remaining assets and liabilities.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5157-58.

While these statements accord with the statute's unrestricted grant of restoration authority to the PBGC, language in the legislative history of SEPPAA suggests that Congress recognized that the decision on restoration should rest with the appropriate adjudicative entity, government agency or court in cases of challenges by third parties to the propriety of a proposed voluntary plan termination, and that the PBGC is not the appropriate decision-maker:

LTV and several of the intervenors urge this court to construe section 4047 as limiting the PBGC's restoration powers to the ability to initiate a civil action for restoration under Title IV's civil enforcement provision. *See* 29 U.S.C. § 1303(e). Imposing such a requirement on the PBGC, LTV argues, reconciles the court order requirements of Title IV's termination provisions with the PBGC's ability to restore plans under section 4047. Under section 4041 of ERISA, the distress termination of a single-employer pension plan of a company undergoing Chapter 11 reorganization can only be achieved with the express approval of the bankruptcy court. *See* 29 U.S.C. § 1341(c)(2)(B)(ii). Similarly, if the PBGC seeks to effect an involuntary plan termination, section 4042(c) of ERISA expressly requires application "to the appropriate United States district court for a decree adjudicating that the plan must be terminated." 29 U.S.C. § 1342(c). In light of the detailed statutory provisions

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> The Committee recognizes that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual or statutory rights of any affected parties. Rather this determination must ultimately rest with the appropriate adjudicative entity, government agency, or court, as the case may be. Furthermore, the decision on what the appropriate remedy should be if the termination is found to have been improper (and specifically, *whether or not the plan should be restored*) also rests with the appropriate adjudicative entity, government agency or court.

H.R.Rep. No. 272, 99th Cong., 2d Sess. 293, *reprinted in* 1986 U.S. Code Cong. & Admin. News 944 (emphasis added).

At the same time, the remarks of Senator Nickles, the Senate Floor Manager of SEPPAA, reveal his expectation that section 4047 places the authority to restore firmly with the PBGC: "I expect that the [PBGC] will block . . . other abuses of the . . . termination rules under Title IV," such as employers' "actions to impel involuntary termination of a plan by the PBGC and thereby limit the liability to plan participants and the PBGC," or actions for the principal purpose of meeting the criteria in section 4041(c)(2)(B) of ERISA for a distress termination. 132 Cong. Rec. S2726 (daily ed. Mar. 14, 1986) (statement of Sen. Nickles).

governing the right to terminate by court order, LTV argues that section 4047's prescription that the PBGC can thereafter take "such action as may be necessary" to restore should be viewed as a method for allowing restoration upon court application by the PBGC, with the plan sponsor having an opportunity to be heard in a formal adjudicatory setting. Restoration may then be proper, LTV contends, if the court that approved termination finds restoration appropriate because the factors underlying the termination have changed materially—not because the PBGC's reasons for wanting restoration are not arbitrary and capricious.

Despite the symmetrical appeal of LTV's contention that Congress could not have intended to grant the PBGC unilateral veto power over court approved termination, established principles of statutory construction compel the conclusion that Congress did intend to grant the PBGC the power to restore terminated plans without first obtaining court approval. First, a court may not impose additional procedural requirements upon an administrative agency. *Vermont Yankee*, 435 U.S. at 523-25. Second, the ordinary meaning of the language of section 4047 suggests that the PBGC needs no judicial authorization to restore a plan. "Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, . . . '[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (quoting *North Dakota v. United States*, 460 U.S. 300, 312 (1983)). Third, the example that Congress used to indicate what might be a proper method of restoring a plan—transferring the plan's assets and liabilities to the plan sponsor—indicates that Congress intended direct PBGC action rather than indirect action through a court proceeding.

Moreover, related provisions of ERISA support the conclusion that Congress intended the PBGC to restore plans through administrative determinations. In addition to the court order requirements in the termination provisions already discussed, Congress also required court approval for action by the PBGC to collect unpaid insurance premiums, 29 U.S.C. § 1307(c); to enforce the PBGC's lien with respect to employer liability, 29 U.S.C. § 1368(d); and to enforce subpoenas, 29 U.S.C. § 1303 (c). Congress' failure to include such a provision in section 4047 is "strong evidence" that it did not intend to impose a requirement of prior court approval with respect to restoration. *See Richerson v. Jones*, 551 F.2d 918, 928 (3d Cir. 1977). "[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed." *Id.* (quoting *General Electric Co. v. Southern Constr. Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967)).

Enforcing the literal meaning of section 4047 is not inconsistent with Title IV's overriding purpose or its statutory scheme. Congress enacted Title IV to encourage the continuation of voluntary private pension plans and to ensure uninterrupted payment of benefits to participants and beneficiaries. 29 U.S.C. § 1302(a). The requirement of court approval for a distress termination under section 4041(c) or an involuntary termination under section 4042 is understandable, because in such terminations, participants may immediately experience cutbacks in their benefit payments. In a restoration, however, the plan is restored to its pretermination status, which means that all benefits under the plan must be paid out of plan assets. The immediate effect on participants, whose interests ERISA primarily protects, is either no change or an increase in benefit payments. It was, therefore, not irrational for Congress not to require prior court approval for restorations. Moreover, a party aggrieved by an allegedly improper restoration is not

without a remedy; the party can seek judicial review of the agency's decision by bringing an action against the PBGC under 29 U.S.C. § 1303(f).

The PBGC acted within the scope of its authority under Title IV when it determined to restore the Plans without first obtaining court approval. The next issue is whether the PBGC's decision was arbitrary and capricious and whether its procedural approach was responsible and consistent with the agency's statutory purpose.

VII. *The Restoration Decision was Arbitrary and Capricious*

The restoration decision was based upon the PBGC's finding that (1) the 1987 CBA Plans constituted an abuse of the termination insurance program, (2) LTV Steel's financial condition had improved to the point where the company could afford to fund the Plans and (3) LTV Steel had demonstrated its willingness to fund retirement programs. The first and third factors concern LTV Steel's establishment of the 1987 CBA plans, and their legal and factual sufficiency as justification for the restoration decision will be considered together.

A. *The 1987 CBA Plans*

The primary factor underlying the PBGC's restoration decision was LTV Steel's adoption of the 1987 CBA Plans, which, the PBGC contends, provide benefits substantially equivalent to those provided under the terminated Plans. The PBGC determined that the 1987 CBA Plans were *de facto* continuations of the Plans and permitted LTV Steel to provide an ongoing retirement program for its employees with a major part of the cost being paid through the PBGC's guarantee of benefits under the terminated Plans. Thus, the PBGC concluded that the 1987 CBA Plans constituted an abuse of the pension insurance program under Title IV.

The PBGC's abuse theory is based largely on three opinion letters issued by the agency since 1981 in which it identified certain factors that might give rise to restoration. In an opinion letter dated April 24, 1981, the PBGC stated that it would not recognize an employer's proposed voluntary termination of a plan under 29 U.S.C. § 1341 in a case where a proposed subsequent benefit program "contemplates the use of the PBGC's guaranteed benefit payments as a constituent element of a redesigned, ongoing retirement program." PBGC Record, p. 204. There, the employer sought to establish two new plans following a proposed termination which, together with the payment of PBGC guarantees, would provide benefits to retirees and employees, both present and future, as though no termination had occurred. The PBGC rejected this proposal, stating:

> In our view, the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program. Accordingly, we believe that a purported termination of one plan, contrived in concert with the establishment of new retirement arrangements which are designed to provide substantially the same benefits for the future, should not be treated as a termination within the statutory contemplation so as to require the payment of PBGC guarantees.

Id., p. 206. Fearing that other employers might "find it advantageous to establish similar arrangements to secure PBGC's payment of the major portion of [their] costs of an ongoing retirement program," the PBGC observed that "the consequences of our acceptance of the type of proposal you are advancing could be either a huge shift of pension costs to PBGC's premium payers, or the total collapse of the insurance system." *Id.*

In an opinion letter dated May 11, 1981, the PBGC reiterated its position that it would not treat as terminated a pension plan whose sponsor subsequently estab-

lished a new retirement program "crafted so that retirees and employees, both present and future, will receive benefits as though no termination had occurred" but with the "PBGC . . . funding a major portion of the program's cost." *Id.*, p. 200. In both 1981 letters, the PBGC stated that it would rely on its restoration authority under section 4047 to prevent the use of PBGC funds "to provide bail-outs for financially pressed firms"—a result which the PBGC deemed to be "patently at odds with the legislative purpose." PBGC Record, p. 206. The PBGC's views on this subject were most recently set forth in an opinion letter dated December 17, 1986. There, the PBGC made clear that it would use section 4047 to restore a terminated plan if an employer's post-termination benefit programs, taken together, "reflect an overall pension scheme which is designed to continue the [terminated] plans after the date of termination established under Title IV of ERISA." PBGC Record, p. 215.

Based on these three opinion letters, which have never been set forth in agency regulations,[26] the PBGC contends that it had identified the establishment of "abusive follow-on" pension plans as a factor sufficient in itself to support restoration of a plan under section 4047 prior to LTV Steel's adoption of the 1987 CBA Plans. Despite being informed of the PBGC's position, LTV Steel proceeded to enter into a post-termination collective bargaining agreement that incorporates what the PBGC contends are abusive follow-on plans. LTV Steel, on the other hand, contends that nothing in ERISA or the legislative history supports the PBGC's abuse theory and, to the contrary, that both ERISA and non-ERISA statutory and case law suggest that certain types of follow-on plans are permissible. Thus, LTV Steel argues, the PBGC's abuse theory is flawed as a matter of law.

[26] At a hearing before the bankruptcy court on June 16, 1987 on LTV's application to enter into the 1987 CBA with the USWA, the PBGC's Executive Director testified that the Dec. 17, 1986 PBGC Opinion Letter had been published, although she did not state in what administrative news source. The Executive Director also stated that the policies expressed in the three opinion letters had never been adopted in the form of regulations promulgated by the agency. *See* PBGC Record, pp. 199-200, 207.

In reviewing an agency's interpretation of the statute it administers, a court must address two questions. First, it must determine whether Congress had a specific intent as to the meaning of a particular phrase or provision. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). When analyzing the language and legislative history of the provision, a court is "not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history." *Rettig v. PBGC*, 744 F.2d 133, 141 (D.C. Cir. 1984). As the Supreme Court noted in *Chevron*, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

However, if it appears that "Congress did not actually have an intent" regarding the particular question at issue, *id.* at 845, and the court finds that Congress explicitly or implicitly delegated to the agency the task of filling the statutory gap, the court must uphold the agency's interpretation of the provision if it "represents a reasonable acccommodation of conflicting policies committed to the agency's care by the statute." *Id.* (quoting *United States v. Shimer*, 367 U.S. 374 (1901). Therefore, if the court concludes that "Congress did not actually have an intent" with respect to what might be considered an abuse of the termination insurance system, it is required to grant a considerable degree of deference to the PBGC's reconciliation of competing statutory policies. *Nachman Corp. v. PBGC*, 446 U.S. at 373-74.

The legislative history accompanying the enactment of section 4047 reveals that Congress expressly identified

only improvements in the financial condition of the plan and its sponsor as possible grounds for restoration. The House Conference Report simply states that the PBGC may cease termination proceedings "if the employer and the plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable" and may restore a terminated plan "if, during the period of its operation by the trustee, experience gains [sic] or increased funding make it sufficiently solvent." H.R. Conf. Rep. No. 1280, 93rd Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5157-59.

With respect to abuses of Title IV's termination provisions, Congress expressed concern that an employer might "rely on the insurance [program] as a backup which enables it to be more generous in promising pension benefits to meet labor demands than would be the case if it knew that the benefits would have to be paid for entirely out of the assets of the employer," S. Rep. No. 383, 93d Cong., 1st Sess. 87, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 4971, or that an operating employer might rely on plan termination "to renege on his agreement to contribute to the plan with impunity," and to shift the amount of his unfunded vested liabilities to the PBGC. 120 Cong. Rec. 4283 (1974). To discourage such potential abuses, Congress imposed limited termination liability on employers under section 4062 of ERISA. *See* S. Rep. No. 383, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4971. There is no direct reference in the legislative history that suggests Congress intended such abuses to be remedied by restoration under section 4047.

Similarly, the legislative history of SEPPAA, the 1986 amendments to ERISA, does not necessarily support the PBGC's claim that Congress recognized follow-on plans as an abuse of Title IV. Prior to the 1986 amendments, a plan sponsor was free to terminate its single-employer

pension plan at any time. H.R. Rep. No. 241, 99th Cong., 2d Sess. 41, *reprinted in* 1986 U.S. Code Cong. & Ad. News 685, 699. The employer therefore controlled the incidence of any claim against the insurance program and, to some extent, the amount of such claim. *Id.* at 690; *see In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 651 (2d Cir. 1983). Two specific abuses resulted. First, profitable employers with low net worth had terminated their plans under section 4041 in order to transfer their unfunded pension liabilities onto the PBGC. Second, profitable employers had terminated their pension plans in order to evade responsibility for paying certain benefits which participants and beneficiaries had earned, but which were not guaranteed by the PBGC. H.R. Rep. No. 241, 99th Cong., 2d Sess. 42, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 699-700. Thus, in the "Findings and Declaration of Policy" which govern the SEPPAA amendments, Congress stated:

> (4) [T]he current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

29 U.S.C. § 1001b(a)(4).

Congress, therefore, amended Title IV so that an employer could proceed by way of a "standard termination" only if the plan contained sufficient assets to pay all "benefit commitments," defined to include not only those amounts guaranteed by the PBGC, but also all additional amounts to which participants and beneficiaries were entitled under the terms of the terminated plan, to all participants and beneficiaries of the plan. 29 U.S.C. §§ 1301(a)(16), 1341(b); *see* H.R. Rep. No. 241, 99th Cong., 2d Sess. 46, *reprinted in* 1986 U.S. Code Cong. &

Ad. News at 704 ("This requirement protects the PBGC, participants and beneficiaries against the types of abuses described" in the House Report.). Otherwise an employer would have to meet the stringent standards for a "distress termination," which include that the employer be in reorganization proceeding, that the bankruptcy court approve the termination, and that termination is required to permit the employer to continue in business. 29 U.S.C. § 1341(c)(2)(B); *see* H.R. Rep. No. 241, 99th Cong., 2d Sess. 46, *reprinted in* 1986 U.S. Code Cong. & Ad. News at 707 (these standards limit "access to the insurance system to cases of genuine need").

Thus, in passing the 1986 amendments to ERISA, Congress was primarily concerned with abuses resulting from voluntary termination by employers. Congress intended to discourage these abuses by tightening the standards for voluntary terminations in order to limit the transfer of unfunded liabilities to the pension insurance system to cases of severe hardship. There is no indication in the legislative history of SEPPAA that Congress was concerned with the post-termination creation of follow-on plans by an employer whose plan had been involuntarily terminated by the PBGC.[27] The legislative history of ERISA, as amended by SEPPAA, does not mention the post-termination provision of non-guaranteed benefits as an "abuse" of the system that section 4047 was intended to remedy.

[27] Senator Nickles, the Senate Floor Manager of the 1986 Amendments, did express concern "that companies may take action to impel involuntary termination of a plan by the PBGC and thereby limit the liability to plan participants and the PBGC." *See* 132 Cong. Rec. § 2726 (daily ed. Mar. 14, 1986). However, the Senator's remarks indicate that he understood that "abuse" would be a ground for restoration after an involuntary termination only where an employer had acted deliberately in such a manner as to force involuntary termination. *Id.* The Senator did not identify the adoption of follow-on plans as an abuse that could support restoration.

Indeed, it appears that Congress first addressed the issue of post-termination replacement plans during consideration of the Pension Protection Act of 1987. During 1987 four congressional committees—the House Ways and Means Committee, the House Education and Labor Committee, the Senate Finance Committee, and the Senate Labor and Human Resources Committee—considered and passed pension plan termination-related legislation. The House Ways and Means Committee submitted a report to the House Committee on the Budget to accompany the Ways and Means Committee's recommendations on new legislation prohibiting "replacement" plans.[28] The report noted that "under present law" an employer, following a voluntary plan termination, "may continue or attempt to establish a plan that provides retirement benefits to retirees," including a plan "designed to provide the same benefits as the terminated plan" less PBGC benefits:

> *Replacement Plans.* Under present law, an ongoing entity can continue in operation on a profit making basis after transferring liability to the PBGC and without being liable for the amounts paid by the PBGC to plan participants. Similarly, an employer, after terminating a plan in a distress termination, may continue or attempt to establish a plan that provides retirement benefits to employees. Such a plan may be designed to provide the same benefits as the

[28] The Ways and Means proposal was based in part on an Administration proposal, released in February 1987 and endorsed by the PBGC, that prohibited what was labeled "plan reestablishments":

> Except to the extent permitted by the PBGC, an employer (and its controlled group) would be precluded from establishing retirement programs which, in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits.

"The Administration's Proposal on the Funding and Termination of Defined Benefit Pension Plans."

terminated plan less the benefits paid by the PBGC. The committee does not believe that the pension insurance system was intended to permit employers to shift liabilities of ongoing retirement programs to the PBGC. Similarly, the PBGC should not be liable for an employer's pension responsibilities if the employer is able to continue to provide retirement benefits.

Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 3545, together with Supplemental, Additional, and Minority Views, 100th Cong., 1st Sess. (Oct. 26, 1987) ("Budget Report"), p. 1010.

The Ways and Means Committee's proposal would have prohibited the establishment of "replacement plans" following a voluntary distress termination and have given the PBGC authority to bring an action to enforce this prohibition:

> *Replacement Plans.* The bill provides that, if all liabilities to the PBGC have not been satisfied following a distress termination, then the contributing sponsors (and members of the controlled group of the contributing sponsors) are precluded from establishing an arrangement under which retirement benefits are provided or providing for further accruals of retirement benefits under any arrangement previously established. The prohibition applies to all retirement benefits, including benefits provided under both qualified and nonqualified plans, other than benefits provided under a multi-employer plan. The PBGC may bring an action to enjoin any violation of this prohibition.
>
> The prohibition applies during the 5-year period beginning on the termination date and, to the extent provided in regulations, the 1-year period ending on the termination date. It is intended that regulations

> will address situations under which, for example, an arrangement is established or benefits are increased under a preexisting arrangement prior to the plan termination in order to avoid the 5-year rule or to provide replacement benefits. To this end, it may be appropriate to provide that certain amendments or establishments of arrangements are presumed to be for this purpose unless the employer establishes to the contrary, for example, by showing that the increase is consistent with past practices.

Budget Report, pp. 1011-1012. The three other Congressional committees involved did not adopt any provision concerning or prohibiting replacement plans.

The Conference Committee considered the Ways and Means proposal but refused to adopt it, noting the lack of a similar provision in the proposed legislation passed by the other committees. *See* Joint Explanatory Statement of the Committee of Conference, Title IX—Income Security and Related Programs, 15 BNA Pens. Rep. at 75-77 (Jan. 4, 1988). Thus, the Pension Protection Act contains no limitations on new benefit plans adopted after a plan termination. *See* Conference Report on December 22, 1987 Amendments, 133 Cong. Rec. H12185 (daily ed. Dec. 22, 1987).

In sum, the legislative history of ERISA, as amended by SEPPAA and PPA, reveals that Congress has addressed the issues of what constitutes an abuse of the pension termination system and how such abuses are to be remedied. Pre-1987 ERISA law contains no expression of congressional intent with respect to the establishment of pension plans following termination. In 1987 Congress considered an Administration proposal to restrict the use of replacement plans. The only congressional committee to adopt such a proposal recognized an employer's ability under current law to establish new benefit plans after a pension plan termination. Congress, however, failed to

enact the committee's proposed prohibition on follow-on plans, which, in any event, was limited to cases of voluntary distress terminations. Thus, there are sufficient grounds to reject the PBGC's abuse theory as it relates to post-termination replacement plans as necessarily contrary to congressional intent. *See Chevron*, 467 U.S. at 943 n.9.

In section 4047 of ERISA, however, Congress authorized the PBGC to restore plans "in any case in which [it] determines such action to be appropriate and consistent with its duties under [Title IV]." 29 U.S.C. § 1347. Moreover, the legislative history of section 4047 provides that the PBGC may cease termination proceedings "if some other factor made termination no longer advisable." H.R. Conf. Rep. No. 1280, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5157-59. Relying on this language in the statute and its history, the PBGC contends that Congress intended to grant the PBGC broad discretion to identify certain types of follow-on plans as abuses of the termination insurance system. However, even assuming, *arguendo*, that Congress assigned to the PBGC the task of filling the statutory gap and discouraging the adoption of certain post-termination pension arrangements, the Record does not support a finding that the PBGC's determination that the 1987 CBA Plans were abusive "represents a reasonable accommodation of conflicting policies" within Title IV and between Title IV and other non-ERISA laws.

First, the PBGC's exclusive reliance on its three prior opinion letters as expressions of the agency's policy against follow-on plans was unreasonable. Although an agency's "rulings, interpretations and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the PBGC's three prior letters concern cases too factually dissimilar from the instant case to be of sub-

stantial assistance here. Two of the letters involved proposed voluntary terminations of plans to be followed by replacement plans that would continue employer benefits at levels equal to or greater than what had been provided prior to termination. Both proposals expressly contemplated the use of the PBGC's guarantee as an integral part of the employer's pension program. The third opinion letter also involved voluntary termination contrived in concert with the establishment of new retirement arrangements that, together with the PBGC's guarantee, would have continued the terminated plans after the termination date. By contrast, here, the PBGC effected an involuntary termination of LTV Steel's plans based on LTV Steel's inability to meet ERISA's minimum funding standards, the Plans' precarious financial condition, severe underfunding and an expected increase in underfunding, the expected additional cost of shutdown benefits, and the PBGC's desire to avoid an unreasonable deterioration of the Plans and an unreasonable increase in the PBGC's liability. Although LTV readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations, this case does not involve a purported voluntary termination contrived in concert with the establishment of new retirement arrangements designed to provide the same benefits for the future. Following the PBGC's involuntary termination of the Plans, LTV Steel agreed to the new programs in the face of a USWA lawsuit for benefits and the threat of a crippling strike. There is no direct evidence in the Record to indicate that LTV Steel sought to have the Plans terminated so that it could turn around and provide identical benefits to its workers and retirees after the PBGC had assumed most of the cost, whatever inference might be drawn from the sequence of events. Thus, the PBGC's prior opinion letters are of limited precedential value in assessing the abusiveness of pension arrangements established after an involuntary plan termination by the PBGC.

Second, the Record reveals that the PBGC's decision on the abusiveness of the 1987 CBA Plans did not take into consideration the fact that the 1987 CBA resulted in large part from LTV Steel's legal obligations under section 1113 of the Code and the USWA's pursuit of its rights under federal labor law. Section 1113 of the Code was enacted in response to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984),[29] and sets forth both procedural and substantive requirements for amendment of collective bargaining agreements during a Chapter 11 case.[30] Section 1113 is intended to

[29] In *NLRB v. Bildisco & Bildisco*, the NLRB had commenced a petition in the Court of Appeals to enforce its order finding that Bildisco had violated the National Labor Relations Act by unilaterally changing the terms of a collective bargaining agreement and failing to make pension and welfare contributions and to remit dues to the union. Bildisco, a chapter 11 debtor, had meanwhile obtained permission of the bankruptcy court to reject its labor agreement. On appeal, the Supreme Court rejected the argument that an extremely stringent standard for rejection of a collective bargaining agreement be adopted, because the application of such a standard could jeopardize the debtor's ability to reorganize. *Bildisco*, 465 U.S. at 524-26. After the *Bildisco* decision, Congress concluded that as a matter of policy the Supreme Court had reached the wrong result on the merits. Therefore, Congress enacted section 1113 of the Code setting forth special standards and procedures for the rejection of collective bargaining agreements by Chapter 11 debtors.

[30] Section 1113 of the Code provides in pertinent part:

(b) (1) Subsequent to filing a petition and prior to filing an application, seeking rejection of a collective bargaining agreement, the debtor in possession . . . shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protection that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

encourage the collective bargaining process, *In re Century Brass Products, Inc.*, 795 F.2d 265, 273 (2d Cir.), *cert. denied*, 107 S.Ct. 433 (1986), and requires a debtor to negotiate in good faith over any proposed modification in a collective bargaining agreement. *Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82, 89 (2d Cir. 1987). Under Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), mandatory subjects of bargaining include "pension and insurance benefits for active employees," *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971), and "wages, hours and other terms and conditions of employment . . . [including] such 'non wage' benefits as . . . group health insurance," *Connecticut Light & Power Co. v. N.L.R.B.*, 476 F.2d 1079, 1081 (2d Cir. 1973). In addition, the Court of Appeals for the Second Circuit has held that retiree benefits may be the subject of mandatory bargaining during Chapter 11. *In re Century Brass Products, Inc.*, 795 F.2d at 274.

Here, following termination the USWA commenced a lawsuit contending that the PBGC's involuntary termination of LTV Steel's pension plans violated section 1113 of the Code because as a result of termination some USWA retirees and active members ceased receiving benefits afforded them pursuant to the 1986 CBA. Although LTV Steel disputed the contention that an involuntary termination by the PBGC, a party not under the debtor's control, could constitute a violation of section 1113, LTV Steel recognized its duty to bargain in

(1) the trustee has, prior to the hearing made a proposal that fulfills the requirements of subsection (b) (1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause, and

(3) the balance of the equities clearly favors rejection of such agreement.

11 U.S.C. § 1113(b), (c).

good faith with the USWA for an acceptable interim agreement. Collective bargaining produced the 1987 CBA in which the USWA shared the burdens of reorganization with LTV Steel by agreeing to substantial concessions. In deciding that the 1987 CBA Plans were abusive, the PBGC did not consider documents relevant to the USWA's adversary proceeding in the bankruptcy court or the impact of that cause of action on the legality of the 1987 CBA Plans as component parts of a settlement of that lawsuit.[31]

Third, the Record does not indicate whether the PBGC considered the fact that certain elements of the 1987 CBA Plans recapture benefits that are permissible under ERISA. In 1986, Congress enacted amendments to ERISA which provide that after either a voluntary or an involuntary termination of a pension plan the PBGC may appoint itself or another fiduciary to administer a trust, the so-called "4049 trust," to collect and distribute amounts in excess of the benefits guaranteed by the PBGC. *See* 29 U.S.C. § 1349. This section was enacted as a result of the efforts of some employers to limit their liability to plan participants, after a voluntary termination, to their liability for statutorily guaranteed payments. *See, e.g., Murphy v. Heppenstall Co.*, 635 F.2d 233, 239 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142

[31] There is no basis for the PBGC's contention that "willingness" to fund pension plans constitutes "abuse" of Title IV that would warrant restoration. Congress has demonstrated, both in the 1986 amendments to ERISA and in other legislation passed in 1986 to require debtors to pay retiree health and life insurance benefits, that Congress intended that certain retiree benefits be paid in full. Further, LTV Steel's agreement to the pension provisions in the interim labor agreement when the alternative was a strike cannot be characterized as "willingness," *see, e.g., First Nat'l Bank of Cincinnati v. Pepper*, 454 F.2d 626, 632 (2d Cir. 1972); *Union Pacific R.R. Co. v. Public Service Comm'n of Missouri*, 248 U.S. 67, 70 (1918) (Holmes, J.), but rather as an effort to fulfill its fiduciary duty to its creditors. *See, e.g., Wolf v. Weinstein*, 372 U.S. 633, 649 (1963).

(1982). Thus, section 4049 demonstrates express Congressional intent that benefits in excess of the statutory guarantee be paid after termination.

The 1987 CBA expressly provides that certain benefits payable pursuant to the interim plans are to be offset by any equivalent benefit paid from a section 4049 trust. The PBGC did not establish a section 4049 trust following termination, and the Record does not indicate the PBGC's reasons for not appointing such a trustee or even whether the PBGC considered acting under section 4049 prior to learning the terms of the 1987 CBA.[32] The PBGC now contends that one component of the 1987 CBA Plans, the Individual Account Trust, which provides LTV Steel's retirees with between 90 and 100 percent of their non-guaranteed benefits, exceeds section 4049's 75 percent limit on the amount of non-guaranteed benefits that can be collected by a section 4049 trustee. However, the PBGC cannot point to any provision in Title IV that prohibits employees and retirees from seeking to collect 100 percent of the lost benefits.[33] In fact, at least one

[32] Following the USWA's ratification of the proposed 1987 CBA, the PBGC sent a letter proposal to LTV Steel in which it offered to establish a section 4049 trustee. Recognizing that the Chapter 11 status of LTV Steel and other entities precluded payment of any amounts into the section 4049 trust until a plan of reorganization, the PBGC also offered to seek an agreement with the general unsecured creditors for immediate pre-funding of the trust to the extent of the projected value of the trust's claim. In addition, the PBGC advised LTV Steel and the USWA that it would accept the establishment of a future service defined contribution plan.

LTV Steel responded by letter noting that the PBGC was free to establish a section 4049 trust at any time and that the 1987 CBA expressly provided that if such a trust were established, it would offset benefits under the 1987 CBA programs. However, LTV also observed in its letter that the PBGC's proposal only addressed two of the eighteen major issues that had been resolved in the collective bargaining process.

[33] The 1987 PPA Amendments to Title IV eliminate the section 4049 trust but give the PBGC the right to collect 100 percent of non-guaranteed benefits. *See* 29 U.S.C. § 1362(b)(1)(A) (1988 Supp.).

court has held that retirees may pursue such benefits through suit for breach of contract.

In *Murphy v. Heppenstall*, a group of retired USWA employees sued their employer following the involuntary termination by the PBGC of a pension plan established pursuant to a pension collective bargaining agreement. The retirees sought payment of non-guaranteed pension benefits. Focusing on contract provisions substantially similar to those in the 1986 Republic and J & L Pension Agreements, the Third Circuit held that the employer's obligation was not limited to the funds already contributed to the terminated pension plan. Rather, the Court held that the collective bargaining agreement established a contractual obligation to provide pension benefits, following a plan termination, in excess of those guaranteed by the PBGC. *Murphy v. Heppenstall*, 635 F.2d at 236. The PBGC filed a brief as amicus curiae in *Murphy v. Heppenstall* in which it supported the claims of the retirees to recover directly from the employer any non-guaranteed benefits to which the employer had contractually obligated itself and argued that nothing in ERISA imposes a cap on the payment of non-guaranteed benefits. *See Murphy v. Heppenstall*, 635 F.3d at 239. The Record does not indicate that the PBGC considered the holding of *Heppenstall* and the position it took in that case in reaching its conclusion that the 1987 CBA Plans constituted an abuse of Title IV.

The PBGC argues that the holding in *Heppenstall* cannot be stretched to permit the payment of additional retirees benefits under an ongoing retirement plan that also permits active employees to accrue or become eligible for benefits as if no termination had occurred. Thus, one of the PBGC's primary objections to the 1987 CBA Plans is that they take into account, for certain purposes, service earned by LTV Steel's employees prior to January 12,

1987.[34] However, nothing in ERISA prohibits benefit plans established after the termination of a defined benefit plan from crediting services from the date of hire for eligibility purposes. Indeed, under section 203(b)(1) of ERISA, all of an employee's years of service with an employer, except for certain limited exceptions, must be taken into account when computing the period of service under a defined benefit plan for purposes of determining the participant's nonforfeitable right to a percentage of his accrued benefit derived from the employer's contribution. *See* 29 U.S.C. § 1053(b)(1). Therefore, the PBGC's position that crediting pre-termination service for determining eligibility constitutes an "abuse" of the pension system that would justify the PBGC's restoration of the terminated plans appears contrary to ERISA's general policies on service accrual. Moreover, the Supreme Court has recognized the important function that seniority serves in pension plans. *See, e.g., Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977). By arguing that pre-termination service should not be credited under the new plans, the PBGC ignores a principle, well-established in case law and recognized in ERISA, that an employee generally receives credit for all years of service for pension purposes. The Record does not contain a basis for the PBGC's rejection of this principle in the context of post-termination replacement plans.

Finally, the Record does not contain such a detailed comparison of the terminated Plans and the 1987 CBA

[34] In her affidavit submitted in support of the PBGC's opposition to LTV's motion in the bankruptcy court for authorization to enter into the 1987 CBA, the Executive Director of the PBGC stated that the "PBGC views a set of arrangements as substantially the same if it grants credit for purposes of benefit accrual, or for eligibility for certain types of benefits, for service rendered under the terminated plan or if it provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC because of the limitations set forth in Title IV of ERISA." PBGC Record, pp. 194-95.

Plans as would establish a reasonable basis for the PBGC's conclusion that the latter constitute a *de facto* continuation of the former. The PBGC's comparative analysis, as set forth in the Record, consists of three paragraphs in the affidavit of C. David Gustafson ("Gustafson Affidavit"), the Manager of the PBGC's Actuarial Policy Division, submitted in support of the PBGC's opposition to LTV's motion in the bankruptcy court for authorization to enter into the 1987 CBA, and a five-page summary of the description of the 1987 CBA Plans that LTV submitted in connection with that motion.[38] In addition to noting the percentage of non-guaranteed benefits that would be paid present and future retirees under the IAT, the Gustafson Affidavit states that the Disability Income Benefits for Acting Employees component of the new plans "allows participants in the [terminated] Plans who become disabled after the plan terminations to receive a benefit under similar conditions and in an amount substantially similar to the amount that would have been provided before termination of the . . . Plans." PBGC Record, p. 225. The Gustafson Affidavit also states that the "Pre-Retirement Surviving Spouse Benefit, Extended Supplemental Unemployment Benefits and Lump Sum Severance Program components of the Follow-on Agreements all operate to replace benefits that were available under the . . . Plans that have either been reduced or are not paid by the PBGC as a result of plan termination." *Id.* Based on these findings, the SEPPAA Working Group concluded that the 1987 CBA Plans "essentially continue the terminated plans by providing substantially the same benefits and by paying amounts in excess of PBGC's guarantee limitations." PBGC Record, p. 642.

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[38] The PBGC's Record also contains a twelve-page summary of the proposed 1987 CBA, dated August 1987, that the USWA leadership provided to the union's members to help them understand and to encourage them to ratify the results of the union's negotiations with LTV Steel. The USWA Summary is not the product of the PBGC's own analysis. *See* PBGC Record, pp. 1157-68.

It is not disputed that one of the USWA's primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated. The union and the company do not dispute that the 1987 CBA substantially achieved that goal. However, they contend that the problems created by the company's precarious financial condition and the threat posed by the union's ability to conduct a costly strike necessarily led to concessions by both sides that produced significant distinctions between the old and new plans. The USWA notes that the basic plan for active employees under the 1987 CBA is a defined contribution rather than a defined benefit plan, and, therefore, the new plan is not insured by the PBGC under Title IV. *See* 29 U.S.C. § 1321(b)(1). Thus, the 1987 CBA Plans do not increase the PBGC's financial exposure. Moreover, the USWA cites as additional significant distinctions the fact that (1) none of the new programs are guaranteed by the PBGC, (2) benefits under the new plans are provided through welfare plans, insurance companies or general corporate assets, while all benefits under the terminated Plans were provided under a single defined benefit plan, (3) the new plans contain certain more restrictive age and service eligibility requirements, and (4) under the new plans, length of service does not necessarily increase the amount of some benefits. The Record, however, does not contain any analysis by the PBGC of the differences, as opposed to the similarities, between the old and new plans and, therefore, does not reflect a reasoned consideration of the concessions by LTV Steel's employees and retirees that lay beneath the differences between the two plans.

The PBGC has argued that if LTV is permitted to adopt these particular follow-on plans, "it could become routine for employers to file for bankruptcy primarily to escape their pension benefit obligations. Most significantly, the temptation for other major integrated steel

producers to use Title IV as a tool for financing the kinds of operational restructuring they need to remain competitive in the industry would be virtually irrestible." PBGC Memorandum in Support of its Motion for Summary Judgment ("PBGC Memorandum"), p. 63. While the PBGC's argument is not devoid of logic, it is unsupported by any facts or even expert opinion in the Record, and the Record does not contain any analysis of the extent of any such threat, if realized.

In sum, the legislative history of Title IV does not support the PBGC's characterization of post-termination pension plans as abuses of the pension plan termination insurance program. However, even if the PBGC does have the discretion to identify certain post-termination plans as abusive of Title IV, the Record does not suggest that the PBGC's characterization of the 1987 CBA Plans as abusive was the product of a reasoned consideration of factors particular to LTV Steel's bankruptcy, of competing policies within Title IV, or of the obligations imposed on LTV Steel by federal bankruptcy and labor law. The PBGC's failure even to address these issues was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. at 43; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. at 172-47. Therefore, on the administrative record now before this court, restoration cannot be upheld on the ground that the 1987 CBA Plans constitute an abuse of Title IV.

B. *LTV Steel's Improved Financial Condition*

The PBGC's Restoration Notice cited a substantial improvement in the financial condition of LTV Steel since the Plans were terminated as a second factor warranting restoration.[38] The legislative history of section 4047 ex-

[38] The Record partially belies the PBGC's contention that an alleged improvement in LTV Steel's financial improvement was an important factor in the restoration. An early draft of an Executive Summary dated September 18, 1987 concerning the SEPPAA Work-

pressly recognizes a plan sponsor's "favorable reversal of business trends" as sufficient to "ma[k]e termination no longer advisable." *See* H.R. Conf. Rep. No. 1280, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5157-59. LTV does not contend that the PBGC would not be justified in restoring a terminated plan or in abandoning termination proceedings if the plan sponsor became financially able to fund the plan. Restoration under such circumstances is wholly consistent with SEPPAA's declaration that "the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system [occur] only in cases of severe hardship." 29 U.S.C. § 1001b(c)(4). However, LTV and certain intervenors object to the PBGC's conclusion that LTV Steel's financial condition had improved so substantially during the eight months following termination that it could afford to fund the Plans.

In support of its objections to the PBGC's calculation of the cost of restoration and of LTV Steel's ability to fund the Plans, LTV Steel has submitted affidavits from its financial officers that contain cost calculations that differ greatly from the PBGC's figures. The PBGC correctly objects to the submission of these affidavits as beyond the scope of the administrative record to which review on this motion for summary judgment is confined. However, the Record alone establishes that the PBGC's

ing Group recommendation to restore the Plans states, "During their deliberations on this matter, the members of the working group indicate that they would have recommended restoration in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed." *See* PBGC Record, p. 672. In the final draft of this Executive Summary, which was forwarded to the Executive Director, this sentence was changed to read, "LTV's improved financial circumstances were not the primary basis for the recommendation that the plans be restored." *See* PBGC Record, p. 638.

determination that LTV Steel can afford the Plans was arbitrary and capricious. This conclusion is based on the PBGC's failure to (1) lay an adequate foundation in the Record for its conclusion that LTV Steel's financial condition had improved, which differentiated between the company's financial condition at the time of restoration as opposed to termination, (2) set forth in the Record the basis for two critical assumptions it adopted in calculating the costs of restoration, and (3) consider the requirements under ERISA concerning the financial viability of single-employer pension plans.

The PBGC's conclusion that the financial condition of LTV Steel substantially improved during the second half of 1986 and the first half of 1987 appears to be based solely upon LTV Steel's accumulation of cash as a result of its status as a debtor under Chapter 11. Thus, the PBGC points to data in the Record showing that LTV Steel was able to make substantial cash advances to LTV; spend almost $150 million for capital improvements; pay off $433 million in prepetition bank debt; make payments of $234.5 million in prepetition employee-related expenses; fund the 1987 CBA Plans; and pay its post-petition accounts on a timely basis. Moreover, the Record shows that LTV Steel's operating results for the first five months of 1987 exceeded the optimistic forecasts in the LTV 1987-1988 Operating Plan. The PBGC contends that these data in the Record document the substantially improved financial circumstances upon which the PBGC based its restoration decision.

The Record does not support the PBGC's decision. First, the Record does not explain the weight the PBGC attaches to the Chapter 11 status of a plan sponsor when it reviews a company's financial health. Here, the improvements in LTV Steel's financial condition were unremarkable for a Chapter 11 debtor and were foreseeable at the time the Plans were terminated. Indeed, to a large extent, termination and restoration were based on the

same two-year business plan.[37] Thus, the only additional information the PBGC possessed when it decided to restore the Plans that it did not possess at the time of termination was the knowledge that LTV Steel's actual operating results for the first five months of 1987 had exceeded the Operating Plan's projections. Based on LTV Steel's improved financial results over this five-month period, the SEPPAA Working Group concluded that "LTV Steel alone would be able to fund [the Plans] in the near future" even though it conceded that it did "not have sufficient data to predict LTV Steel's long-term cash flow with any certainty." PBGC Record, p. 645.

The PBGC failed to establish a reasonable basis for its contention that improvements in LTV Steels' financial condition between January 1987 and September 1987 justified restoration. First, it was not reasonable for the PBGC to rely on improvements in LTV Steel's financial results that were caused by factors that were foreseeable at the time of termination—such as the protection from creditors and suspension of interest payments provided by the automatic stay and LTV's anticipated shutting down of unprofitable and noncompetitive steel operations. Second, in assessing LTV Steel's early 1987 results, it was not reasonable for the PBGC to rely on such short term factors as the work stoppage at one of LTV Steel's major competitors, USX, without analyzing the extent to which such factors could reasonably be expected to benefit LTV Steel over the long run. In sum, the Record does not indicate that the PBGC's conclusion as to LTV Steel's improved financial condition was based on the agency's

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[37] The PBGC's SEPPAA Working Group, at the first meeting to discuss *restoration*, acknowledged, in reference to the 1987-1988 Operating Plan, that at the time of the decision to terminate the Plans "financial analysis presented to the group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding requirements." PBGC Record, p. 645.

consideration of factors that were not foreseeable at the time of termination and that were reasonably expected to continue to benefit the company in the future.

Based on its observations concerning LTV Steel's improved financial condition, the PBGC determined that LTV Steel could afford to meet its minimum funding obligations to the Plans. This conclusion was based largely on a summary financial analysis prepared by a PBGC staff member and reviewed by the PBGC's outside financial advisor, Goldman, Sachs & Co. The PBGC's analysis relied on LTV's own figures and did not attempt to "project economic or other factors that will affect LTV in the future." PBGC Record, p. 12. In its analysis, the PBGC assumes that LTV Steel's cash flow in 1988 will be $265 million before the attempted restoration. The PBGC analysis further assumes that in 1988 the contribution required for the three pension plans will be $260 million; that $90 million, the cost of the 1987 CBA Plans should be subtracted from that figure because that sum duplicates amounts which would be paid into the restored Plans; and that $50 million in savings from USWA job reduction and related concessions in the 1987 CBA may also be subtracted. The PBGC's calculation results in an incremental cash cost of restoration of $120 million in 1988.

The PBGC's calculation was based on two fundamental, yet unexplained and unexamined assumptions: (1) that the $50 million in savings from job reductions conceded by the USWA in the 1987 CBA would be preserved whether or not the Plans were restored and (2) that LTV Steel would be able to obtain waivers from the IRS for its minimum funding contributions for the years 1984-1986. As for the $50 million in job reductions, the PBGC Financial Summary assumed that "further bargaining [would] preserve[] the job reductions." PBGC Record, p. 12. The Record, however, does not support this assumption. The $50 million savings in job reductions is

dependent upon the continued viability of the 1987 CBA. Upon restoration, LTV Steel or the USWA can exercise its right under the 1987 CBA's "snapback" provision to void that agreement and revive the 1986 CBA, thus retracting the $50 million savings. The Record sheds no light on the PBGC's justification for its assumption. Without some insight into the agency's rationale and in light of the intensity and bitterness that accompanied the 1987 collective bargaining sessions between LTV Steel and the USWA, no basis is found in the Record to support a conclusion that the USWA would leave such concessions in place once its members began receiving full benefits under the Plans and collective bargaining began anew.

The Record is similarly devoid of any justification for the PBGC's assumption that LTV Steel would be able to obtain waivers for its outstanding minimum funding contributions. Termination of the Plans followed shortly after the IRS had refused to grant LTV Steel a waiver for the 1985 plan year and had revoked its waiver for the 1984 plan year. Thus, upon restoration, LTV Steel would have been subject to an immediate claim for past due minimum contributions for the 1984-1986 plan years, totaling more than $600 million. The Record does not indicate what factors the IRS would consider in responding to waiver requests or on what grounds the PBGC based its conclusion that the IRS would respond favorably to such requests. Thus, the Record provides no basis for a finding that the PBGC's assumption on the waiver issue was reasonable.

Apart from the absence of adequate justification for the PBGC's calculations, the Record is also silent on (1) the standards that the PBGC applies to determine whether a Chapter 11 debtor, like LTV Steel, can afford to fund its pension plans and (2) the possibility that the Plans might have to be reterminated. As to the first

issue, the Record does not specify, for example, what percentage of a steel manufacturer's cash flow is normally allocated to pension funding.[38] Therefore, the Record does not provide an objective comparative basis for the PBGC's conclusion that LTV Steel is able and should be required to fund the Plans. As to the second issue, it appears that PBGC did not consider the relevance to a restoration decision of Title IV's standards governing voluntary and involuntary terminations. Several of the intervenors have argued that if the PBGC intends to restore the Plans on the grounds that LTV Steel can afford to fund them, the PBGC should be required to demonstrate, at minimum, that the Plans will not be reterminated in the near future. This would require the PBGC to demonstrate more than simply that in absolute numbers LTV Steel's cash flow would be sufficient to fund the Plans. Because the PBGC did not address the prospect of retermination, the Record does not establish grounds for the PBGC's failure to apply the termination standards for financial viability in reaching its decision that LTV Steel could fund the Plans.

The PBGC has attempted to shift the focus away from the gaps in its financial analysis by contending that "the ability to comply fully with ERISA's minimum funding standard is not a factor PBGC has determined must be shown in order for restoration to be appropriate." [39]

[38] LTV Steel's projected net cash flow for 1988 was $265 million, and the PBGC calculated the net incremental cost of restoration to be $120 million. Therefore, the PBGC's restoration decision implies that if the annual cost of restoration is less than 50 percent of the debtor's projected annual cash flow, restoration is appropriate. The court cannot analyze whether this implication is consistent with ERISA since the PBGC has never addressed, formally or informally, the question of what percentage of a Chapter 11 debtor's cash flow should be deemed adequate to fund the full cost of the debtor's minimum funding obligations.

[39] In its memorandum in support of the instant motion, the PBGC also states: "In this case, for example, even without further funding, the Plans have assets sufficient to pay full Plan benefits for several years." PBGC Memorandum, p. 62. However, the PBGC was aware when it terminated the Plans that the Plans had "assets to carry them for approximately 4 to 5 years without additional contributions." PBGC Record, p. 4. Thus, the fact that the Plans had sufficient assets to pay full benefits for several years was known at the time of termination and, in any event, is irrelevant to a determination of whether LTV Steel can afford to fund the Plans.

PBGC Memorandum, p. 62. The PBGC's attempt to minimize the importance of ERISA's minimum funding requirements is unavailing. Under ERISA the short-term financial health of a plan is irrelevant if the plan is not viable over the long term. ERISA is intended to encourage long-term plans, not plans whose lives are measured in months or even years. So-called "pay-as-you-go" plans are illegal under the statute. *See* 29 U.S.C. § 1002(31). The IRS regulations that a plan must meet in order to be guaranteed by the PBGC, *see* 29 U.S.C. § 1321, also demand long term viability:

> The term "plan" implies a *permanent* as distinguished from a temporary program. Thus, although the employer may reserve the right to change or terminate the plan, and to discontinue contributions thereunder, the abandonment of the plan for any reason other than business necessity *within a few years after it has taken effect* will be evidence that the plan from its inception was not a bona fide program for the exclusive benefit of employees in general.

I.R.C. Reg. 1.401-1(b)(2) (emphasis added). The PBGC has not offered a compelling reason why Title IV's concern for the long term viability of pension plans should not apply with equal force in the context of a restoration decision.

In conclusion, the Record does not indicate that the PBGC's determination that LTV Steel's financial condition had improved to the extent that it could fund the

Plans was the result of reasoned and intelligible decision-making by the agency. The PBGC did not attempt to justify through critical analysis its assumptions concerning the costs of restoration. The PBGC failed to set forth adequately a basis for its conclusion that LTV Steel's financial condition had improved in ways that were not foreseeable at the time of termination and that could reasonably be attributed to long term factors. Therefore, the PBGC's decision to restore the plans on this ground was not the product of the agency's thorough examination of all relevant factors, did not contain an adequate explanation of the agency's assumptions and was, therefore, arbitrary and capricious. On this administrative record, restoration cannot be upheld on the grounds that LTV Steel can afford to fund the Plans.

VIII. *The PBGC's Procedures Were Inadequate*

One of the most troublesome issues presented in this case is the process that brought the parties before this court. The PBGC's involvement in LTV's bankruptcy escalated sharply after it commenced involuntary termination proceedings and obtained a court order terminating the Plans in accordance with section 4042's detailed standards and procedures. Thereafter, the PBGC, acting both as a creditor and an adversary, monitored LTV's efforts at reorganization and opposed LTV's efforts to conclude the 1987 CBA. During August and September 1987, the PBGC returned to its role as a regulator and restored the Plans, thereby returning to LTV the obligation to make several hundred million dollars in annual contributions to pension plans whose restructuring had been one of LTV's primary goals in entering bankruptcy. In so doing, the PBGC exercised its express authority under section 4047—a single-paragraph provision in ERISA that permits the PBGC to take actions of such consequence without providing the agency even the most minimal of procedural and substantive guidance.

When one juxtaposes the circumscription of sections 4041 and 4042 governing plan terminations with the open-ended discretion of section 4047, it becomes apparent that the scope and precision of ERISA that the Supreme Court admired when it referred to ERISA as a "comprehensive and reticulated statute," *Nachman Corp. v. PBGC*, 446 U.S. at 361, does not yet extend to section 4047. Based upon the limited legislative history of Title IV's restoration provision, Congress has yet to address fully the circumstances, standards and procedures under which restoration should occur. It has been demonstrated above that neither of the substantive grounds asserted by the PBGC can support restoration on this Record. The final inquiry under the APA's "arbitrary and capricious" standard of review is whether the PBGC's procedural approach to restoration produced a complete, reviewable record and guaranteed fairness to LTV. *Overton Park*, 401 U.S. at 417.

LTV asserts three basic challenges to the PBGC's procedural approach. First, LTV claims that the PBGC improperly decided to restore the Plans without first following formal rulemaking procedures to establish standards governing plan restorations. Second, LTV contends that it was denied due process because the PBGC is a biased adjudicator and, therefore, should be disqualified from adjudicating restoration. Third, LTV argues that the PBGC's factfinding was inadequate. The PBGC responds that section 4047 authorizes the agency to make such determinations as the restoration decision through informal adjudication and that it therefore was not required to conduct a formal hearing or to promulgate rules. Further, the PBGC contends that its prior opinion letters put LTV on notice that the agency was opposed to follow-on plans and that LTV had adequate opportunity during the summer of 1987 to present its views on restoration to the PBGC.

The PBGC arrived at its decision to restore the Plans through informal agency adjudication. The APA defines "adjudication" as "agency process for the formulation of an order." 5 U.S.C. § 551(7). Adjudication can be formal, as where the agency conducts "trial-type" proceedings, or informal. Since section 4047 of ERISA is silent on the procedures that the PBGC should observe in reaching a decision to restore a terminated plan to its pre-termination status, the PBGC was not obligated to conduct "formal" adjudication, which is required under the APA only when a decision is "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a); *see also* 5 U.S.C. §§ 554(c)(2), 556(a), 557(a). Moreover, since "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267, 294 (1974), the PBGC acted within its authority in proceeding to restore the Plans through informal adjudication.[40]

LTV's claim that the PBGC's statutory mandate under ERISA prevents the agency from acting as an impartial arbiter is premised on the assumption that the PBGC's primary motive in restoring the Plans is to profit from the 1987 PPA amendments to ERISA when the Plans are reterminated, which LTV contends is inevitable. LTV cites the settled principle of administrative law that

[40] The Supreme Court decisions recognizing agencies' discretion to choose between rulemaking or adjudication do not limit that discretion to cases in which the agency conducts formal adjudication. *NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. at 294; *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Courts have recognized agency discretion to choose between rulemaking and adjudication regardless of whether "trial-type" adjudicatory proceedings are utilized. *See Coos-Curry Electric Cooperative, Inc. v. Jura*, 821 F.2d 1341, 1346 n.5 (9th Cir. 1987); *Capitol Technical Services, Inc. v. FAA*, 791 F.2d 964, 971 n.46 (D.C. Cir. 1986).

where an adjudication is tainted by the decisionmaker's bias it must be invalidated. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); *Porter v. Califano*, 592 F.2d 770, 780-82 (5th Cir. 1979). The PBGC's statutory conflict of interest derives, LTV argues, from Congress' failure to give the PBGC access to the coffers of the United States to fulfill its obligations. *Cf.* Federal Deposit Insurance Corporation, 12 U.S.C. §§ 1817(d), 1821; Federal Savings and Loan Insurance Corporation, 12 U.S.C. §§ 1785, 1727. Instead, the PBGC is dependent upon premiums, transfers of assets, and recoveries from claims against plan sponsors. Because the PBGC must maximize its recoveries against plan sponsors, LTV contends, it cannot act as the impartial arbiter of restoration to which LTV is entitled as a matter of due process. LTV argues that the PBGC's structural conflict of interest is similar to that of ERISA trustees of multi-employer plans recognized in *United Retail & Wholesale Employees v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 141-42 (3d Cir. 1986), *aff'd by an equally divided Court*, 107 S. Ct. 2171 (1987), and has been recognized in the context of termination. *See In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d at 651-52 (ERISA requires PBGC to seek court approval for involuntary termination because choice of termination date has financial implications for PBGC that may conflict with interests of plan beneficiaries).

As discussed above, if the Plans were restored and then reterminated and if the PPA, in particular the amendments to section 4062, were deemed to be applicable to the Plans, the PBGC's claim for termination liability could increase by $800 million. Although recognizing the difficulty of discovering indicia of bad faith in an administrative record compiled by the agency itself, there is a genuine reluctance to ascribe improper motives to a government agency in the absence of adequate proof. *Cf. Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (contention that combination of investigative and

adjudicative functions creates unconstitutional risk of bias in agency adjudication must overcome presumption of honesty and integrity in those serving as adjudicators). Here, the PBGC contends that it restored the Plans to further the purposes of Title IV, and there is no indication in the Record that the impending amendments to ERISA influenced the PBGC's decision or that the PBGC relied upon the adoption of the proposed amendments. Moreover, as discussed above, whether the PBGC would be able to invoke the PPA amendments to increase its claim on behalf of a plan that was terminated and restored prior to their enactment and thereafter quickly reterminated is an open question not presently before the court. Speculation about the PBGC's recovery against LTV in the event of retermination, therefore, cannot support LTV's claim of agency bias.[41]

Restoration is a regulatory act that does not permit the PBGC to recover on its claims against a plan sponsor or to increase the amount of its claims. If anything, restoring a plan to a financially unsound company potentially increases the PBGC's loss by allowing employee benefits to accrue against an employer with dwindling assets and insufficient cash flow. On the other hand, restoring a plan to a financially healthy plan sponsor simply ensures that participants will receive their full bene-

[41] One of the intervenors has asserted that, because of its institutional interest and in light of public statements by the PBGC's Executive Director the PBGC was predisposed to oppose the 1987 CBA Plans and thus could not function as an impartial arbiter in the restoration dispute. However, the Supreme Court has made clear that a decisionmaker is not disqualified "simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 493 (1976) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Here, there has been no showing that would bar the PBGC from adjudicating restoration of the terminated Plans.

fits and is consistent with the purposes of Title IV. Unlike involuntary termination by the PBGC and claims for withdrawal liability by ERISA trustees, restoration does not involve fixing a liability against the plan sponsor.[42] Thus, apart from LTV's assertion that the PBGC wrongly intends to enhance its claim by restoring, reterminating, and invoking the benefits of the PPA, there is nothing in ERISA that disqualifies the PBGC from acting as the impartial arbiter of a restoration decision.

There is substantial merit, however, to LTV's third and final claim of procedural error concerning the inadequacy of the PBGC's factfinding. This claim encompasses the PBGC's failure to develop a complete, reviewable record, its failure adequately to apprise LTV of the grounds for restoration and its failure to give LTV adequate opportunity to rebut those grounds. Here, the Record shows that the PBGC's gathering of facts pertaining to LTV Steel was defective.

Even though it adjudicated restoration without a formal hearing, the PBGC was required to observe the "fundamental proposition of administrative law that interested parties must have an effective chance to respond to crucial facts." *Carson Prods. Co. v. Califano*, 594 F.2d 453, 459 (5th Cir. 1979). In several opinions, the Supreme Court has articulated the minimum procedural safeguards that must accompany agency decisionmaking. Thus, the Court has declared, "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496

[42] If and when the PBGC does recover on its claims for termination liability against LTV, the amount of the PBGC's recovery will be controlled by the termination provisions of Title IV, *inter alia*, 29 U.S.C. §§ 1341, 1342, 1362 and 1368, and the processes of adjusting claims in bankruptcy.

(1959). Beyond that, "[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." *Bowman Transp. v. Arkansas-Best Freight Sys.*, 419 U.S. at 288 n.4. And "[t]hose who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Morgan v. United States*, 304 U.S. 1, 18-19 (1938). Finally, the Court has held that the opportunity for response must come "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).[43]

Moreover, the Court of Appeals for this Circuit has held that in the absence of specific regulations, an administrative agency must (1) proceed in accordance with ascertainable standards and (2) provide a statement showing the agency's reasoning when applying those standards. *Patchogue Nursing Center v. Bowen*, 797 F.2d 1137, 1143 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 873 (1987); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968). Although the PBGC acted within its authority in attempting to evolve standards for restoration during an ongoing restoration proceeding, *SEC v. Chenery Corp.*, 332 U.S. at 203, it nevertheless had an obligation to set forth those standards with sufficient clarity to permit LTV to challenge them. *Id.* at 196.

[43] *See also CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1159-60 (D.C. Cir. 1987) ("A precept fundamental to the administrative process is that a party must have an opportunity to refute evidence utilized by the agency in decisionmaking affecting his or her rights."); *cf. Belland v. PBGC*, 726 F.2d 839, 845 n.10 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984) (adequacy of PBGC's fact-finding procedure with respect to determination of plan termination date was not disputed and all parties had been accorded "the opportunity to submit relevant information"); *A-T-O, Inc. v. PBGC*, 634 F.2d 1013, 1023-24 (6th Cir. 1980) (no facts in dispute and plaintiff had "full opportunity" through its written submissions and briefs to argue the law).

The PBGC's Restoration Notice simply informed LTV that the Plans were being restored because of LTV's adoption of abusive follow-on plans and LTV's improved financial circumstances. However, prior to issuing the Restoration Notice, the PBGC never informed LTV of the standards it had developed to determine whether the 1987 CBA Plans were impermissible *de facto* continuations of the terminated plans. Apart from three conclusory paragraphs in an affidavit submitted by the PBGC's actuary describing the similarities in terms of benefits and service accrual provided under the old and new plans, the record does not contain any written communication to LTV setting forth a detailed comparison of the two sets of plans and identifying specific components of the new plans that, under the PBGC's standards, contravene the policies of Title IV.[44] As discussed above, the PBGC's three prior opinion letters were factually too dissimilar to provide adequate notice to LTV of the agency's objections to the 1987 CBA Plans.

As for the second justification asserted for restoration, the PBGC did not inform LTV that it was considering

[44] The Minutes of the August 6 and 10, 1987 meetings of the SEPPAA Working Group indicate that the Group "decided not to [recommend restoration of] the Republic Salaried Plan [one of the four terminated LTV Steel plans] at this time because PBGC expects to recover 100 per cent of the plan asset insufficiency for that plan, and because of the uncertain impact of the plan's exposure for lump sum payments on its ability to meet annual benefit payments from required minimum funding contributions." PBGC Record, p. 645. It would appear that the PBGC's reasons for restoring the other plans—the abusiveness of the 1987 CBA Plans and LTV's improved financial condition and "willingness" to fund employee benefits—would apply with equal force to the Republic salaried plan. Thus, in the absence of ascertainable standards concerning follow-on plans, it is difficult to understand the PBGC's decision not to restore the fourth plan.

the improvement in LTV Steel's financial condition as a basis for restoring the Plans. Moreover, as discussed above, the Record does not disclose the standards that the PBGC applies when it evaluates the financial condition of a Chapter 11 plan sponsor and determines that the sponsor can afford to fund its previously terminated plans. The Record contains only the PBGC's comparison of absolute numbers for LTV Steel's cash flow and the minimum funding costs of the restored Plans. Thus, even if LTV had been aware that the PBGC was considering its improved financial condition as a basis for restoration, without some indication from the PBGC as to the standards and assumptions under which the agency conducted its financial analysis, LTV would have had a difficult time rebutting the agency's numbers in a rational and meaningful manner.

The PBGC contends that LTV was made aware of the agency's opposition to follow-on plans as early as May 1987 and that LTV had the opportunity on at least five separate occasions to present its views on restoration. PBGC officials did meet with LTV officials on July 9, 10 and 13, 1987 and again on September 19 and 21, 1987. However, nothing in the Record suggests that those meetings were anything more than settlement discussions concerning the PBGC's ongoing litigation efforts to block the 1987 CBA and the administrative responses to the 1987 CBA Plans that the agency was then considering.[45] The PBGC never requested from LTV a written statement setting forth its opposition to restoration on the grounds being considered by the PBGC. Indeed, LTV was not informed that the Plans were being restored in part because of its improved financial circumstances and ability to

[45] In addition to restoration, it appears that the PBGC was also considering (i) reducing the amount of checks being dispersed to retirees by the amounts made up in the 1987 CBA Plans, (ii) continuing pending litigation over the 1987 CBA Plans, and (iii) taking no further action. PBGC Record, pp. 666, 668.

fund the Plans until it received the Restoration Notice. Thus, not only did the PBGC fail to offer LTV any guidance on how to submit its opposition to restoration to the agency, it also failed to inform LTV of all the factors on which it sought to base its restoration decision until after it had issued a final decision. *Cf. National Organization for Women, Washington, D.C. Chapter v. Social Security Admin.*, 736 F.2d 727, 740-41 (D.C. Cir. 1984) (*per curiam*) (Robinson, C.J., concurring). Several informal meetings with the PBGC and the agency's open-ended invitation to LTV that it would "be happy to consider any additional information you might wish to supply," PBGC Record, p. 1572, fall far short of the minimum amount of process that should have accompanied a decision of such enormous consequence to LTV, its creditors and the USWA.

Thus, it appears that here the PBGC obtained its facts primarily through its dual status as a creditor in LTV's bankruptcy proceeding and an adversary in litigation against LTV to block the 1987 Plans. In addition to financial information LTV provided to its creditors and LTV's court filings, the PBGC relied upon public documents LTV filed with the SEC. It does not appear that the PBGC exercised its investigative authority under ERISA to gather data directly from LTV.

In sum, in reaching its decision to restore the Plans, the PBGC did not follow procedures that would have afforded LTV a meaningful and timely opportunity to rebut the factual bases for the restoration decision. The PBGC did not adequately specify its objections to the 1987 CBA Plans as *de facto* continuations of the terminated plans so as to give the company a framework for a counter-presentation demonstrating the significant differences between the old and new plans. The PBGC did not inform LTV that it intended to base restoration in part on the company's improved financial condition nor did it seek up-to-date information regarding the company's financial

prospects for the future.[46] In view of the consequences of restoration, the PBGC's procedures were severely defective. *Cf. National Organization for Women,* 736 F.2d at 745 (Mikva and McGowan, J.J., concurring) (*Overton Park* procedures must be "severely defective" to justify *de novo* review).

CONCLUSION

The special nature of reorganization proceedings and the protection to be given to the reorganization process are well recognized: "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco & Bildisco,* 465 U.S. at 528. "In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future." *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 203 (1983). "The Code expresses a preference toward reorganization rather than liquidation; a viable reorganization plan typically provides greater payment to creditors while preserving the economic life of the entity." *Matter of A&B Heating & Air Conditioning,* 823 F.2d 462, 465 (11th Cir. 1987).

Against this well-settled preference for and deference to reorganization proceedings are placed the efforts of a government agency for exercise for the first time its express authority under ERISA to take action potentially radically at odds with the goals and interests of those parties attempting to reorganize a company billions of dollars in debt. Enacted "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are

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[46] Although the PBGC was aware that LTV had announced it would release the company's seven-year business plan early in October 1987, PBGC Record, p. 638, the agency decided to go ahead with restoration based on the company's actual results for the first half of 1987 and the company's projections in the 1987-1988 Operating Plan.

not paid when pension plans are terminated," *Nachman Corp. v. PBGC,* 446 U.S. at 374, Title IV of ERISA creates a pension plan termination insurance program that expressly contemplates payment of the PBGC's guarantee only in cases of severe hardship. There is no indication in the legislative history or in the language of the statute that Title IV was intended to be used as a source of funds available to financially troubled employers seeking to shed their pension liabilities, reorganize and assure higher recoveries for their creditors.

If Congress intended to create a government subsidy for reorganizing companies as a matter of federal industrial policy, a direct and explicit finding in that regard would be appropriate. Congress should not wait for reorganizing companies to bankrupt an underfunded government corporation already $4 billion in debt, PBGC Record, p. 227, and leave to the courts the task of discerning the congressional purpose with respect to an issue of fundamental importance to the survival of many ailing American industries and the welfare of their employees. In the absence of a clear expression of congressional intent to the contrary, the PBGC's unmistakable authority to restore terminated plans must be recognized. For the reasons stated above, these are the considerations that have led to today's holding that restoration by the PBGC of the Plans is not barred by the automatic stay and can be adjudicated outside the framework of a bankruptcy proceeding without subjecting the agency to a contempt proceeding.

At the same time, a government agency must act in accordance with intelligible standards and procedures reasonably designed to guarantee fundamental fairness. Judicial review is limited to ensuring that the agency adheres to these precepts. As Judge Bazelon wrote:

> Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require ad-

> ministrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary. Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process and to improve the quality of judicial review in those cases were judicial review is sought.

Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

Here, the PBGC restored annual funding obligations totalling more than two hundred million dollars to LTV Steel, a Chapter 11 debtor, without ascertainable standards, an exploration of all the relevant facts, and adequate procedures for factfinding and notice. For these reasons and those stated above, the PBGC's decision to restore the Plans cannot be upheld on this administrative record, and its motion for summary judgment is denied. Since the agency's decision is not sustainable on the administrative record, the appropriate remedy is to vacate the restoration decision and remand the matter to the PBGC for further consideration consistent with this opinion. *Vermont Yankee*, 435 U.S. at 549; *Camp v. Pitts*, 411 U.S. at 143.

Today's decision holds that the PBGC cannot base restoration simply upon LTV's adoption of pension arrangements pursuant to the 1987 collective bargaining agreement. There is, however, support in the legislative history of Title IV and the language of the statute that would support restoration on the basis of LTV's ability to fund the Plans. The PBGC may, therefore, desire to seek to establish such ability to fund, not on the Record

as presently constituted, but by trial *de novo* on the issue of LTV Steel's improved financial circumstances.

Upon the findings and conclusions set forth above, LTV's application for an order enforcing the automatic stay is denied, as is the PBGC's motion for summary judgment. The Restoration Notice is hereby vacated. The parties are directed to confer and arrange with chambers a conference for further proceedings on this matter.

IT IS SO ORDERED.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N.Y.
June 22, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

87 CIV. 7261 (RWS)

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

THE LTV CORPORATION, *et al.,*
Defendants.

JUDGMENT

[Filed Sept. 12, 1988]

This action having come on for hearing before the Court; the issues having been duly heard; findings, conclusions and an opinion having been issued by the Court on June 22, 1988; and the Court having determined pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay, it is hereby

ORDERED, that PBGC's motion for summary judgment is denied; and it is further

ORDERED, that the PBGC's Notice of Restoration is vacated; and it is further

ORDERED, that the Clerk enter judgment in favor of Defendants The LTV Corporation and LTV Steel Company, Inc. on the complaint by PBGC against them.

Dated: New York, New York
September 7, 1988

/s/ Robert W. Sweet
ROBERT W. SWEET
United States District Judge

This document was entered on the Docket on 9/13/88.

STATUTORY PROVISIONS

All citations are to the 1982 edition of the United States Code, as modified by Supplement IV (1986).

29 U.S.C. § 1302

§ 1302. Pension Benefit Guaranty Corporation

(a) Establishment within Department of Labor

There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

* * * *

(d) Board of directors; compensation; reimbursement for expenses

The board of directors of the corporation consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce. Members of the Board shall serve without compensation, but shall be reimbursed for

travel, subsistence, and other necessary expenses incurred in the performance of their duties as members of the board. The Secretary of Labor is the chairman of the board of directors.

* * * *

29 U.S.C. § 1341

§1341. Termination of single-employer plans

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing

collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit commitments (determined as of the termination date).

(2) Termination procedure

(A) Notice to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth—

(i) certification by an enrolled actuary—

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit commitments (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit commitments,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that the information on which the enrolled actuary based the certification under clause (i) and the information provided to the corporation under clause (ii) are accurate and complete.

(B) Notice to participants and beneficiaries of benefit commitments

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan—

(i) specifying the amount of such person's benefit commitments (if any) as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit commitments:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from the corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if—

(I) it has reason to believe that any requirement of subsection (a)(2) of this section or subparagraph (A) or (B) has not been met, or

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit commitments.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written

agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if—

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit commitments (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of

the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide the benefit commitments under the plan and all other benefits (if any) under the plan to which assets are required to be allocated under section 1344 of this title, or

(ii) in accordance with the provisions of the plan and any applicable regulations of the corporation, otherwise fully provide the benefit commitments under the plan and all other benefits (if any) under the plan to which assets are required to be allocated under section 1344 of this title.

(B) Certification to the corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay the benefit commitments under the plan and all other benefits under the plan to which assets are required to be allocated under section 1344 of this title.

(4) Continuing authority

Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination date of a plan terminated in a standard termination under this subsection, of its authority under section 1303 of this title with re-

spect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corporation's obligations under section 1322 of this title.

(c) Distress termination of single-employer plans

(1) In general

A single-employer plan may terminate under a distress termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraph (B) of paragraph (2) are met.

(2) Termination requirements

(A) Information submitted to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) certification by an enrolled actuary of—

(I) the amount (as of the proposed termination date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such date) of the benefit commitments under the plan,

(III) whether the plan is sufficient for benefit commitments as of such date,

(IV) the actuarial present value (as of such date) of benefits under the plan guaranteed under section 1322 of this title, and

(V) whether the plan is sufficient for guaranteed benefits as of such date;

(iii) in any case in which the plan is not sufficient for benefit commitments as of such date—

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation (or its designee under section 1349(b) of this title) to be able to make payments to participants and beneficiaries as required under section 1349 of this title; and

(iv) certification by the plan administrator that the information on which the enrolled actuary based the certifications under clause (ii) and the information pro-

vided to the corporation under clauses (i) and (iii) are accurate and complete.

(B) Determination by the corporation of necessary distress criteria

Upon receipt of the notice of intent to terminate required under subsection (a)(2) of this section and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the termination date) a contributing sponsor of such plan or a substantial member of such sponsor's controlled group meets the requirements of any of the following clauses:

(i) Liquidation in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed or has had filed against such person, as of the termination date, a petition seeking liquidation in a case under title 11 or under any similar law of a State or political subdivision of a State, and

(II) such case has not, as of the termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed, or has had filed against such person, as of the

termination date, a petition seeking reorganization in a case under title 11 or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the termination date, been dismissed, and

(III) the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) approves the termination.

(iii) Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce

The requirements of this clause are met by a person if such person demonstrates to the satisfaction of the corporation that—

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

(C) Substantial member

For purposes of subparagraph (B), the term "substantial member" of a controlled group means a person whose assets comprise 5 percent or more of the total assets of the controlled group as a whole.

(D) Notification of determinations by the corporation

The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(3) Termination procedure

(A) Determinations by the corporation relating to plan sufficiency for guaranteed benefits and for benefit commitments

If the corporation determines that the requirements for a distress termination set forth in paragraph (1) and (2) are met, the corporation shall—

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit commitments (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination

After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) Cases of sufficiency for benefit commitments

In any case in which the corporation determines that the plan is sufficient for benefit commitments, the plan administrator shall proceed to distribute the plan's assets, and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3) of this section, and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) Cases of sufficiency for guaranteed benefits without a finding of sufficiency for benefit commitments

In any case in which the corporation determines that the plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit commitments on the basis of the information made available to it—

(I) the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3) of this section, make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan, and

(II) the corporation shall establish a separate trust in connection with the plan for purposes of section 1349 of this title.

(iii) Cases without any finding of sufficiency

In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it—

(I) the corporation shall commence proceedings in accordance with section 1342 of this title, and

(II) the corporation shall establish as separate trust in connection with the plan for purposes of section 1349 of this title unless the corporation determines that all benefit commitments under the plan are benefits guaranteed by the corporation under section 1322 of this title.

(C) Finding after authorized commencement of termination that plan is unable to pay benefits

(i) Finding with respect to benefit commitments which are not guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit commitments which are not benefits guaranteed by the corporation under section 1322 of this

title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation concurs in the finding of the plan administrator (or the corporation itself makes such a finding) the corporation shall take the actions set forth in subparagraph (B)(ii)(II) relating to the trust established for purposes of section 1349 of this title.

(ii) Finding with respect to guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 1342 of this title.

(D) Administrator of the plan during interim period

(i) In general

The plan administrator shall—

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsec-

tion (a)(2) of this section and ending on the date on which the plan administrator receives notification from the corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation make a finding under subparagraph (C)(ii).

(ii) Requirements

The requirements of this clause are met by the plan administrator if the plan administrator—

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination of this subsection,

(II) pays benefits attributable to employer contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer, and

(IV) continues to pay all benefit commitments under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 1322 of this title or to which assets are required to be allocated under section 1344 of this title.

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) Sufficiency

For purposes of this section—

(1) Sufficiency for benefit commitments

A single-employer plan is sufficient for benefit commitments if there is no amount of unfunded benefit commitments under the plan.

(2) Sufficiency for guaranteed benefits

A single-employer plan is sufficient for guaranteed benefits if there is no amount of unfunded guaranteed benefits under the plan.

(e) Limitation on the conversion of a defined benefit plan to a defined contribution plan

The adoption of an amendment to a plan which causes the plan to become a plan described in section 1321(b)(1) of this title constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) of this section or distress termination under subsection (c) of this section.

29 U.S.C. § 1342

§ 1342. Termination by corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of title 26 has been mailed with respect to the tax imposed under section 4971(a) of title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(b)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). The corporation is authorized to pool the assets of terminated plans for purposes of administration and such other purposes, not inconsistent with its duties to the plan participants and the employer maintaining the plan under this subchapter, as it determines to be required for the efficient administration of this subchapter.

(b) Appointment of trustee

(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power—

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with

prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power—

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this pargaraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,

(D) each employer who is or may be liable to the plan under section [1] part 1 of subtitle E of this subchapter,

(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and

(F) each employer organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under

[1] So in original.

section 704 of title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings

An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay or other proceedings

Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.

(i) Establishment of separate trust for terminated plan

In any case in which a plan is terminated under this section in a termination proceeding initiated by the corporation pursuant to subsection (a) of this section, the corporation shall establish a separate trust in connection with the plan for purposes of section 1349 of this title, unless the corporation determines that all benefit commitments under the plan are benefits guaranteed by the corporation under section 1322 of this title or that there is no amount of unfunded benefit commitments under the plan.

29 U.S.C. § 1347

§ 1347. Restoration of plans

Whenever the corporation determines that a plan which is to be terminated under section 1341 or 1342 of this title, or which is in the process of being terminated under section 1341 or 1342 of this title, under this subtitle

should not be terminated under section 1341 or 1342 of this title as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 1341 or 1342 of this title. In the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pre-termination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

81-11
§ 4041
§ 4047
§ 4048
[PBGC LOGO] § 4062

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006

May 11, 1981

Re: Hourly Rate Employees' Pension Plan

This is in response to your inquiries and confirms the oral advice I gave you on April 27, 1981, concerning the proposed termination of the Hourly Rate Employees' Pension Plan (the "Hourly Plan"), and the Amended and Restated Supplementary Benefits Agreement (the "Supplemental Agreement") that proposes to adopt in the future. In brief, the Supplemental Agreement will provide a target benefit pension plan and certain other retirement benefits for current employees. Moreover, a side-letter agreement between (the "Union") would assure that no participant's benefits would be diminished as a result of the Hourly Plan's termination. You have asked whether the adoption of these arrangements will affect the proposed termination of the Hourly Plan. As more fully explained below, the Pension Benefit Guaranty Corporation ("PBGC") has determined, based on all the information disclosed, that under the circumstances you have presented to us, the Hourly Plan should not be treated as terminated under Section 4041 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1341.

filed a Notice of Intent to Terminate with PGBC on October 19, 1979 and proposed a date of termination of October 31, 1979. Documents enclosed with the Notice of Intent to Terminate indicate, based on our review, that the plan asset insufficiency of the Hourly Plan on the proposed date of termination is over $4,000,000. Further, other documents enclosed with the Notice appear to indicate that may have had little, if any, net worth as of the proposed date of termination and during the preceding 120 days, so that employer liability amounts calculated under Section 4062 of ERISA, 29 U.S.C. § 1362, may be substantially less than the plan asset insufficiency. Additionally, it appears that intends to continue operating as an ongoing business with the same products and the same employees.

It is clear that your total proposal contemplates the use of PBGC's guaranteed benefit payments as a constituent element of a redesigned, ongoing retirement program. The redesigned program would transfer a large liability from to the PBGC, while providing substantially similar, if not greater, benefits to present and future employees and retirees subsequent to the purported termination of the Hourly Plan as would have been the case absent such termination. To accomplish this result, proposes to adopt and implement the various elements of the Supplemental Agreement: the Target Benefit Plan (the "Target Plan"), a disability insurance plan, a severance pay plan, additional group life insurance benefits, and the side-letter agreement. The Supplemental Agreement would have an effective date of October 7, 1980. As we understand it, the Target Plan would be established for current employees of The targeted benefit would be greater than that provided under the Hourly Plan at the time of its termination. Contributions to each individual participant account would be computed so that the account balance at the participant's normal retirement date (age 65) would provide the targeted benefits.

For current employees of who were vested under the Hourly Plan, the Target Plan would provide benefit credit for service after February 1, 1977. Moreover, for current employees who were not vested under the Hourly Plan, the Target Plan would also provide credit for all past service and would require funding of such a participant's account for such service.

Also, for current employees, the disability insurance, severance pay, and additional life insurance plans in the Supplemental Agreement would provide benefits which were included under the Hourly Plan and which would otherwise have been lost because of the termination of that Plan.

The proposed side-letter agreement recites that the foregoing arrangements are intended to assure that Hourly Plan participants receive at least the same benefits as those provided by the Hourly Plan, and provides that will make up the difference in any case where the combination of new plans and PBGC guarantee payments inadvertently results in a diminished benefit.[1]

[1] We understand that the proposed side-letter agreement is intended to replace, but have the same effect as the following "Intent" provision from an earlier version of the Supplemental Agreement:

> "It is the intent of the parties hereto that no [Hourly Plan] participant (or any intended beneficiaries of any such person) shall sustain a loss or diminution of benefits by virtue of the termination of the [Hourly Plan]. The Target Benefit Plan, together with amounts received under the [Hourly Plan] pursuant to Title IV of ERISA and the amounts payable [for early retirement, surviving spouse coverage and disability benefits], is intended to provide benefits that will in no event be less than those to which employees, retirees and their beneficiaries would have been entitled had the [Hourly Plan] remained in full force and effect through the expiration of this Agreement. In the event that it shall appear that any such person will not receive such undiminished benefits under this combination of programs, whether through inadvertence, miscalculation or otherwise, the Company shall promptly act to remedy any such deficiency."

Putting these various pieces together—the Target Plan, the disability, severance pay and insurance plans, the side-letter agreement, and the payment of PBGC guarantees—it is evident that the total package has been crafted so that retirees and employees, both present and future, will receive benefits as though no termination had occurred. The package has been designed, however, so that PBGC would be a funding a major portion of the program's cost, based upon a purported termination of the Hourly Plan.

In our view, the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program. Accordingly, we believe that a purported termination of one plan, contrived in concert with the establishment of new retirement arrangements which are designed to provide substantially the same benefits for the future, should not be treated as a termination within the statutory contemplation so as to require the payment of PBGC guarantees.

If PBGC guarantees were to be paid under such circumstances, then any company whose unfunded liabilities under a defined benefit pension plan exceed 30% of its net worth could find it advantageous to establish similar arrangements to secure PBGC's payment of the major portion of its costs of an ongoing retirement program. Such a result would have extremely adverse cost consequences for this insurance system. Our review of available data for major corporations whose pension liabilities are reported by Standard & Poor's Compustat service has readily identified over 20 very large firms whose unfunded pension liabilities substantially exceed 30% of their net worth, and whose financial difficulties would undoubtedly make tempting the adoption of arrangements similar to those you are proposing. The combined unfunded pension liabilities of those plans which have been thus identified is approximately $6.0 billion, and PBGC's potential exposure if they were to terminate, based upon

net worth estimates, is some $4.1 billion. Thus, the consequences of our acceptance of the type of proposal you are advancing could be either a huge shift of pension costs to PBGC's premium payers, or the total collapse of the insurance system.

We do not believe the statute should be read so narrowly as to require PBGC to accept a result so patently at odds with the legislative purpose—which is, after all, to protect the pension expectations of individual retirees and workers, not to provide bail-outs for financially pressed firms—and so inimical to this program's continuing viability.

For example, Section 4047 of ERISA 29 U.S.C. 1347, provides PBGC with express authority to limit plan terminations. That section states in pertinent part:

> Whenever the corporation determines that a plan which is to be terminated, or which is in the process of being terminated, under this subtitle, should not be terminated *as a result of such circumstances as the corporation determines to be relevant*, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated. [emphasis added]

The breadth of this provision is further reflected in its additional grant of authority to PBGC to restore to its pre-termination status, a plan whose termination has already been completed. In addition, under section 4048 of ERISA, 29 U.S.C. 1348, there is no date of plan termination unless one is agreed to by PBGC (or established by a court).

Under all of the facts you have presented to us, and for the reasons discussed above, we do not believe it appropriate to agree that a plan termination would occur. In view of the necessity to protect the insurance system

from the cost of having its guarantees used to fund an employer's ongoing retirement program, we conclude that the Hourly Plan would not be treated as terminated under the circumstances you have proposed.

Sincerely,

/s/ Robert E. Nagle
ROBERT E. NAGLE
Executive Director

[PBGC LOGO]

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washintgon, D.C. 20006

April 24, 1981

This is in response to your inquiries concerning the proposed termination of the "Hourly Plan") and the pension plans that Inc. intends to adopt in the future. In brief, you have stated that will establish a target benefit plan for current employees and a defined benefit supplemental plan for retirees and certain current employees. You have asked whether the adoption of these two new plans will affect the proposed termination of the Hourly Plan. As discussed more fully below, the Pension Benefit Guaranty Corporation ("PBGC") has determined, based on the information at hand, that under the circumstances you have presented to us the Hourly Plan should not be treated as terminated under Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1341.

proposes to terminate the Hourly Plan as of November 13, 1980. A review of various documents submitted by you to PBGC indicates that the plan asset insufficiency of the Hourly Plan on the proposed date of termination may be greater than $30,000,000. Further, other documents submitted indicate that net worth during the period of July through November, 1980, will be low, so that employer liability amounts calculated under section 4062 of ERISA, 29 U.S.C. § 1362, may be substantially less than the plan asset insufficiency. Additionally, it appears that intends to continue operating as an ongoing business with substantially the same products and the same employees.

It is clear that your total proposal contemplates the use of PBGC's guaranteed benefit payments as a constituent element of a redesigned, ongoing retirement program. The redesigned program would transfer a large liability from Facet to the PBGC, while providing substantially similar benefits to present and future employees and retirees subsequent to the purported termination of the Hourly Plan as would have been the case absent such termination. To accomplish this result, proposes, concurrently with the termination of the Hourly Plan, to adopt and implement two new pension plans: the

"Target Plan") and a still unnamed supplemental plan. It appears that each new plan would have an effective date of November 13, 1980. As we understand it, the Target Plan would be established for current employees of . The targeted benefit would be identical to that provided under the Hourly Plan at the time of its termination: $11.00 per month per year of service. Contributions to each individual participant account would be computed so that the account balance at the participant's normal retirement date (age 65) should provide the targeted benefits. Additionally we understand that has agreed to make extra contributions (approximately $60.00 a year) to the accounts of participants with 27 or more years of service with the company.

For current employees of who were vested under the Hourly Plan, the Target Plan would provide benefit credit for service after November 13, 1980. Moreover, for current employees who were not vested under the Hourly Plan, the Target Plan would also provide credit for that past service as long as the employee will complete 10 years of service sometime after November 13, 1980.

The second new plan—the supplemental plan—would be established primarily for the more than 1400 employees

who retired or who terminated service with vested benefits under the Hourly Plan before November 13, 1980. Certain current employees would also be entitled to benefits. The supplemental plan would be established as an IRS qualified, defined benefit plan, and would apparently be covered under Title IV of ERISA.

As we understand it, the net effect of the supplemental plan would be as follows: any person who retired or who terminated employment with a vested deferred benefit under the Hourly Plan before November 13, 1980, is expected by to receive guaranteed benefits from PBGC due to the proposed termination of the Hourly Plan. If the guaranteed benefit is less than the benefit provided under the Hourly Plan, the supplemental plan would pay the difference to the participant as a monthly retirement benefit. Any current employee, who had 10 or more years of service prior to November 13, 1980, is also expected by to receive a guaranteed benefit from PBGC. In the case of such persons who had at least 10 years of service before April 1, 1976, and whose guaranteed benefit from PBGC would be less than the benefit provided under the Hourly Plan, the supplemental plan would pay the difference for benefits attributable to pre-April 1, 1976 service.

Putting these various pieces together—the Target Plan, the supplemental plan, and the payment of PBGC guarantees—it is evident that the total package has been crafted so that retirees and employees, both present and future, will receive benefits as though no termination had occurred. The package has been designed, however, so that PBGC would be funding a major portion of the program's cost, based upon a purported termination of the Hourly Plan.

In our view, the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program. Accordingly, we believe that a purported termination of one plan, contrived in concert with

the establishment of new retirement arrangements which are designed to provide substantially the same benefits for the future, should not be treated as a termination within the statutory contemplation so as to require the payment of PBGC guarantees.

If PBGC guarantees were to be paid under such circumstances, then any company whose unfunded liabilities under a defined benefit pension plan exceed 30% of its net worth could find it advantageous to establish similar arrangements to secure PBGC's payment of the major portion of its costs of an ongoing retirement program. Such a result would have extremely adverse cost consequences for this insurance system. Our review of available data for major corporations whose pension liabilities are reported by Standard & Poor's Compustat service has readily identified over 20 very large firms whose unfunded pension liabilities substantially exceed 30% of their net worth, and whose financial difficulties would undoubtedly make tempting the adoption of arrangements similar to those you are proposing. The combined unfunded pension liabilities of those plans which have been thus identified is approximately $6.0 billion, and PBGC's potential exposure if they were to terminate, based upon net worth estimates, is some $4.1 billion. Thus, the consequences of our acceptance of the type of proposal you are advancing could be either a huge shift of pension costs to PBGC's premium payers, or the total collapse of the insurance system.

We do not believe the statute should be read so narrowly as to require PBGC to accept a result so patently at odds with the legislative purpose—which is, after all, to protect the pension expectations of individual retirees and workers, not to provide bail-outs for financially pressed firms—and so inimical to this program's continuing viability.

For example, Section 4047 of ERISA 29 U.S.C. 1347, provides PBGC with express authority to limit plan terminations. That section states in pertinent part:

> Whenever the corporation determines that a plan which is to be terminated, or which is in the process of being terminated, under this subtitle, should not be terminated *as a result of such circumstances as the corporation determines to be relevant*, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated. [emphasis added]

The breadth of this provision is further reflected in its additional grant of authority to PBGC to restore to its pre-termination status, a plan whose termination has already been completed. In addition, under section 4048 of ERISA, 29 U.S.C. 1348, there is no date of plan termination unless one is agreed to by PBGC (or established by a court).

Under all of the facts you have presented to us, and for the reasons discussed above, we do not believe it appropriate to agree that a plan termination has yet occurred. In view of the necessity to protect the insurance system from the cost of having its guarantees used to fund an employer's ongoing retirement program, we conclude that the Hourly Plan should not be treated as terminated under the circumstances you have proposed.

In making the foregoing determination, we have, as you requested, considered the financial arrangements between the Corporation and and their relationship to the proposed supplemental plan. You point out that at the time that was divested by , along with assets and liabilities of what was to become the Hourly Plan, executed a guaranty , dated April 1, 1976. Under that instrument guaranteed the payment, to participants who were to be covered by the Hourly Plan and who had previously been covered by a plan, of all benefits to which they were entitled under the terms of their plan as of

April 1, 1970. , in turn, agreed to indemnify for any payments it might have to make under the Guaranty.

If the Hourly Plan is terminated, it is really PBGC that will make the major portion of the payments covered by the Guaranty, with the supplemental plan being established by to pay the remaining portion.

There is nothing about this arrangement which detracts from our conclusion that the Hourly Plan should not be treated as terminated, or which alleviates our concern that payment of PBGC guarantees under that proposed termination is being sought for purposes not contemplated by the statute.

Indeed, the entire history of - dealings with respect to the Hourly Plan may warrant considerably closer scrutiny. As we understand the facts, consists of several former divisions which was required to divest under a 1974 Federal Trade Commission consent order. The divestiture arrangements, which were completed on April 1, 1976, included 's transfer to of very substantial unfunded pension liabilities which had accrued under pension plans—more than two-thirds of which were attributable to predivestiture retirements. While , under the terms of the Guaranty, guaranteed the payment to participants of the benefits represented by those liabilities, was obliged to fund such liabilities, and to agree to indemnify for any amounts the latter might eventually be required to pay under the Guaranty.

After became independent of 's control, it filed suit to require to reassume the pension obligations that claimed it had been wrongfully caused to assume, and to have declared null and void its forced obligation to indemnify for any payments which might be made under the Guaranty.

In October 1979 announced that this lawsuit had been settled. With respect to the pension liabilities,

agreed to accept from a transfer of some additional assets to the plans, but even after that transfer was still left with unfunded liabilities of approximately $45 million. (While we understand that the Internal Revenue Service approved this transfer of additional assets to the plans as consistent with the requirements of Section 414(1) of the Internal Revenue Code, its consideration of the matter did not extend to what appears to have been a major issue in the lawsuit—the appropriateness of the total amount of pension liabilities which had been required by to accept.) also agreed to reaffirm its obligation to indemnify for any payments which the latter might have to make under the Guaranty. Thereafter, as soon as its then-current collective bargaining agreement was about to expire, announced its intention to terminate the Hourly Plan, pointing out in a press release the financial advantages of being relieved of its funding expense once the unfunded liabilities were assumed by PBGC.

This chain of events—which culminated in an effort to impose the Hourly Plan's liabilities on the PBGC—raises questions concerning the appropriateness of 's original transfer of liabilities to the Hourly Plan and the manner in which that issue was resolved in the - settlement. Accordingly, even apart from the reasons we have already cited for concluding that the Hourly Plan should not be treated as terminated, we would want to consider those questions more fully before agreeing to a termination of the Hourly Plan.

Sincerely,

Robert E. Nagle
Executive Director

86-27
§ 4041(a)
[PBGC LOGO] § 4047

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1806

Office of the Executive Director

Dec. 17, 1986

This is to advise you that the Pension Benefit Guaranty Corporation (the "PBGC") has reviewed those plans which you have represented as those which Corporation seeks to adopt. Based on our review of the proposed plan documents, our extensive discussions with you and the Union , and a review of facts and circumstances incidental to adoption of these proposed plans, we have determined that if were to adopt such plans, the effect would be a de facto continuation of the previously terminated plans.

Accordingly, pursuant to paragraph 3 of the Agreements entered into between and the PBGC, and pursuant to the PBGC's authority to enforce Title IV of the Employee Retirement Income Security Act ("ERISA"), the PBGC hereby disapproves the adoption of the proposed plans.

Plan termination insurance is to be provided where plans actually and fully terminate. Thus, for example, partial terminations do not give rise to termination-generated claims for guaranteed benefits. *See United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289

(3d Cir. 1983). Nor do insurance claims arise from termination schemes which approximate terminations facially, but which, in fact, continue the plans for covered participants. PBGC Opinion Letter 81-11 (May 11, 1981). *See also Interco Inc. v. Pension Benefit Guaranty Corp.*, 620 F. Supp. 688 (E.D.Mo. 1985).

This principle has been established for a number of years. For example, in PBGC Opinion Letter 81-11, the Executive Director of the PBGC wrote that:

> In our view, the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program. Accordingly, we believe that a purported termination of one plan, contrived in concert with the establishment of new retirement arrangements which are designed to provide substantially the same benefits for the future, should not be treated as a termination within the statutory contemplation so as to require the payment of PBGC guarantees.

This agency ruling proceeded to make clear that "Section 4047 of ERISA, 29 U.S.C. § 1347, provides PBGC with express authority to limit plan terminations" and that "the breadth of this provision is further reflected in its additional grant of authority to PBGC to restore to its pre-termination status, a plan whose termination has already been completed."

Plan termination insurance is designed by Congress to provide insurance for plans which actually terminate. The program is set up to protect participants and beneficiaries who would otherwise be deprived of pensions.

The program is not designed to provide supplemental financing for ongoing pension programs. *Compare* the single-employer insurance program provisions contained principally in 29 U.S.C. §§ 1301-1368 *et seq.*, *with* the multiemployer assistance program provisions contained in 29 U.S.C. §§ 1381-1461.

In this case, filed notices of its intent to terminate its pension plans on October 29, 1985. Prior to that time, however had already agreed with the Union to create a Pensioners' Relief Program to provide financial relief to Union-represented employees who might incur a loss of present or future benefits in the event of termination. *See* 1985 Strike Settlement Agreement (October 15, 1985) at Appendix C.

From the PBGC's perspective, the existence of this relief program, was not in itself, objectionable. However, statements by management[1] and the Union[2] concerning the continuation of benefits after the expected termination date of the plans raised doubts about whether the original plans had in substance been terminated.

The PBGC did not (and does not now) object to participants or beneficiaries receiving all of their promised benefits. The PBGC did object, though, to 's apparent attempt to contrive a new means of improperly diverting termination insurance funds to payment of ongoing pension obligations. Consequently, the PBGC questioned whether the pension plans were, in fact, being continued, albeit in another form. Because of these questions, the PBGC did not initially recognize 's termination notices or assume trusteeship of the underfunded plans.

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[1] *See* Supplemental Answer of Defendants Binger, Denby, Seymour, Marshall, DePalma, Maxwell, Paulson, Allyn, Anderson and Wilbur, *Tintori v. Allyn*, No. 85-1463 at 2 (W.D. Pa. November 8, 1985) (explaining that the Pensioners' Relief Program provided "for the creation of a pension relief fund the purpose of which is to compensate for any loss in pension benefits resulting from the termination of the pension plans . . . in an underfunded status").

[2] The Union explained to its members that the "money going into the new Pension Program should be sufficient to provide relief to those people comparable in value to what they will lose by reason of termination of the pension plans." Summary of Settlement Agreement, (October 17, 1985) at 4.

The PBGC was presented with copies of 's Pensioners' Relief Program in February 1986 in the form of two Voluntary Employees' Beneficiary Associations ("VEBAs") and an individual account plan. In late February, proposed to make a payment from these relief programs to provide temporary relief to its employees. The PBGC advised that, in view of its temporary nature, the single payment standing alone would not itself nullify termination. However, the PBGC further advised that:

> the one-time payment does not and cannot stand alone. Both actions and statements prior to that one-time payment and actions of and others subsequent to that payment must be considered in determining whether the one-time payments was one step among several in continuing, rather than terminating, the pension plans. To the extent that the actions of and others before and after the one-time payment are determined to negate a finding of termination, PBGC reserves the right to include the one-time payment as part of a pattern inconsistent with 's claim to termination. Moreover, in the event that there had been a pre-existing understanding, written or unwritten, for to emerge from its current reorganization proceeding with a program designed to provide retirees with pension relief comparable to what they would be receiving under the terminated plans, PBGC reserves the right to consider each step in any such plan, including the one-time payment, as inconsistent with the concept of termination.

Letter of Edward Mackiewicz, General Counsel, PBGC, to (February 27, 1986).

Following protracted negotiations, the PBGC, and the Union entered into an Agreement, on August 19, 1986, regarding the termination of the hourly pension plans. On the same date, the PBGC and entered into a second Agreement regarding the termination of the plans of 's salaried employees. These Termination

Agreements provided that 's plans "[have] been terminated not later than November 8, 1985, in accordance with the requirements of ERISA." They further provided that the VEBAs would be terminated no later than the earlier of two years from the date of the Agreements or the approval of a bankruptcy disclosure statement. Finally, they provided that would submit any additional plans to the PBGC for its review. The PBGC specifically reserved its right to withhold agreement if the proposed follow-on programs either sought to effect a continuation or restoration of the plans terminated under the Agreements, constituted an ongoing employees' benefit program providing benefits substantially equivalent to those provided under the terminated plans, or otherwise failed to comply with applicable law.

In August and September 1986, submitted to the PBGC for its review a

(Union Supplemental Plan) and a

(Salaried Supplemental Plan).

Under the proposed Union Supplemental Plan, makes contributions each payroll period based upon the number of hours worked by union employees.[3] A portion of that contribution is then credited to the individual account of each participant in Basic Benefit Status or each beneficiary in Ancillary Benefit Status (*i.e.*, presently eligible to receive benefits).

The amount credited to each account is the "Partial Benefit Difference", which is defined in Article 5.3(a) as 95% of the difference between the Prior Pension Plan Benefit (defined in Article 1.19) and the Title IV Benefit guaranteed to be paid by the PBGC under ERISA (as

[3] The contribution derived in this fashion is first reduced by the amount of any contributions previously made to the VEBAs or to a separate individual account maintained for current employees. *See Article* 5.1.

defined in Article 1.25). The Salaried Supplemental Plan uses a formula which is similar in overall effect.[4] Thus, participants or beneficiaries who are or will be receiving guaranteed benefits from the plan termination insurance system would also receive substantial additional benefits from the proposed plans. The effect would seem to be—by appparent design—to situate certain (but not a'l) participants as though the plans had not terminated.[5]

Accordingly, we find that the VEBAs, and the proposed supplemental and follow-on plans, when taken together, reflect an overall pension scheme which is designed to continue the plans after the date of termination established under Title IV of ERISA. This continuation in fact is illustrated by the interrelationship of the pre-termination benefit structure of the purportedly terminated plans and the benefit formulas of the post-termination plans. For example, the VEBAs, and supplemental and follow-on plans, taken together, provide for:

1) *continuation of service for purposes of vesting in a participant's accrued benefit and entitlement to a fully subsidized early retirement benefit after the date of termination.* Under the proposed Supplemental Plans, post-termination service will be taken into account for purposes of determining benefits. The Union Supplemental Plan provides, "In determining the amount of the benefit, a Participant's Service . . . shall be taken into account in determining whether the Participant or his Beneficiary would

[4] Under the Salaried Supplemental Plan, the individual account is credited with 90% of the difference between the Prior Pension Plan Benefit (*see* Article 1.22) and the Title IV Benefit (*see* Article 1.30), plus certain additional benefits, up to a total of $1,000 per month. *See* Article 5.3(a).

[5] The PBGC does not regard as material the relatively small differences between the benefits projected under these proposed Supplemental Plans and those that would have been provided under the original plans.

have been eligible for a benefit (e.g., a disability benefit or a deferred vested benefit) under the terms of a Prior Pension Plan." Article 1.19; *see also* the definition of "Service" in Article 1.24. The Salaried Supplemental Plan has similar provisions. *See* Articles 1.22 and 1.29. Moreover, we understand that this concept would also apply to fully subsidized retirement, such as "30-and-out."

2) *recognition of post-termination events (such as disability) for purposes of determining entitlements under pre-termination benefit formulas.* Under each of the Supplemental Plans, a participant may receive benefits based upon events (such as disability or retirement) occurring after the termination date. Thus, Basic Benefit Status is defined to include the participant who "would have become entitled to an immediate Prior Pension Plan Benefit on or before the Valuation Date because of retirement or disability had the Prior Pension Plan not been terminated." *See* Union Supplemental Plan Article 1.4(c); Salaried Supplemental Plan Article 1.4(c).

3) *resoration or reimbursement for benefits which are not guaranteed under Title IV of ERISA.* Under each of the Supplemental Plans, a participant may receive benefits that fully restored Congressionally-mandated limitations on insured termination benefits.

Thus, the adoption of the supplemental and follow-on plans would result in a de facto plan continuation. If adopted such plans and thereby effected a continuation in fact, then the PBGC would be constrained to exercise its authority under Section 4047 of ERISA to restore all or part of the assets and liabilities existing under the previously terminated plans.

As we have previously agreed, the plans have terminated, and on a date not later than November 8, 1985.

We stand by that agreement. Consequently, if were to adopt the proposed plans, we would only restore assets and liabilities attributable to participants covered under the adopted plans. With respect to participants who are not covered by such plans, there would be no restoration.

We would encourage you to dissuade from its intention to adopt these proposed plans, and thus attempt, in effect, to continue the terminated plans, while having the PBGC pay the guaranteed portion of the terminated plans' benefits. Of course, should or the Union choose to accept restoration and the concomitant obligation to provide all of the affected participants' benefits, we would work with you to help you meet your pension promises.

In sum, we disapprove the proposed follow-on plans because they would effect an impermissible continuation of terminated plans for which guaranteed benefits are being paid. We urge not to adopt these plans, but if it should we would restore assets and liabilities attributable to covered participants. We continue to stand ready to work with you to reach mutually acceptable solutions to the difficult issues between us. In this regard we await your proposals on bankruptcy issues, and your performance under the agreements entered into last spring.

Sincerely,

KATHLEEN P. UTGOFF
Executive Director

ROYAL S. DILLINGER
Deputy Executive Director and
Chief Negotiator

MINUTES OF THE BOARD OF DIRECTORS' MEETING OF THE PENSION BENEFIT GUARANTY CORPORATION HELD SEPTEMBER 18, 1987, VIA TELEPHONE CONFERENCE CALL

Present: William E. Brock, III, Secretary of Labor and Chairman of the Board of Directors, PBGC

James A. Baker, III, Secretary of the Treasury and Member of the Board of Directors, PBGC

Bruce Smart, Acting Secretary of Commerce and Member of the Board of Directors, PBGC

M. Peter McPherson, Deputy Secretary of the Treasury

Royal S. Dellinger, Deputy Executive Director, PBGC

Gary M. Ford, Secretary to the Board of Directors and General Counsel, PBGC

The members of the Board of Directors having received reasonable notice of the meeting, Chairman Brock called the meeting to order at 9:05 a.m. All of the members of the Board of Directors were present via telephone.

Chairman Brock began the meeting by explaining that the Executive Director of the PBGC had before her an internal administrative recommendation that three terminated pension plans of LTV Steel be "restored" to LTV, and had asked the Board for general policy guidance on restoration prior to acting on that recommendation. He noted that the recommendation regarding the LTV plans was based on LTV's adoption of abusive "follow-on" retirement arrangements, the company's improved financial circumstances, and the company's demonstrated willingness to fund employee retirement arrangements.

Chairman Brock noted that the Board and the PBGC have long opposed abusive follow-on retirement arrangements, which use termination insurance funds to help pay the cost of an ongoing retirement program, and that the legislative history indicates that restoration may be used to prevent abuses of the termination insurance program, or where a company's finances have improved. Chairman Brock asked Mr. Ford to read a resolution that Chairman Brock was proposing that the Board adopt. Mr. Ford read the following resolution:

"RESOLVED, that the Board of Directors confirms, as a matter of policy, that the PBGC may exercise its discretion under Section 4047 of ERISA to restore plans as appropriate,

"RESOLVED, that the Board of Directors affirms the authority of the Executive Director of the PBGC to determine when particular pension plans should be restored and to take all appropriate actions necessary to effect those determinations."

Chairman Brock then asked whether anyone desired to discuss the resolution before a vote was taken. Secretary Baker noted with approval that the Board had been consulted on the issue of the restoration of the LTV Plans, and said he expected that that practice would continue in the future. Chairman Brock and Acting Secretary Smart voiced agreement with this comment.

Following discussion, the Directors unanimously approved the resolution. Mr. Ford agreed to provide each director with a written copy of the resolution, and each agreed to sign an original copy of the resolution and send it to Mr. Ford.

Chairman Brock expressed his gratitude to the Board for taking time from their busy schedules to consider and act on the restoration issue, and adjourned the meeting at approximately 9:20 a.m.

[PBGC LOGO]

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1806

Sep. 22, 1987

The LTV Corporation
Plan Administrator of the
Jones & Laughlin Hourly Pension Plan;
Jones & Laughlin Retirement Plan;
Pension Plan of Republic Steel Corporation
Dated and Effective as of March 1, 1950
2001 Ross Avenue
Dallas, Texas 75201-2911

LTV Steel Company, Inc.
25 West Prospect Avenue
Cleveland, Ohio 44115

NOTICE OF RESTORATION

Please take notice that the Pension Benefit Guaranty Corporation (the "PBGC") has determined, pursuant to Section 4047 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that it is appropriate and consistent with PBGC's duties under Title IV of ERISA to restore to pretermination status the Jones & Laughlin Hourly Pension Plan, the Jones & Laughlin Retirement Plan and Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (the "Plans"). This determination is based on three factors: LTV Steel's establishment, after the termination of the Plans, of a retirement program that results in an abuse of the pension plan termination insurance system established by Title IV of ERISA; LTV Steel's improved financial circumstances; and LTV Steel's demonstrated willingness to fund employee retirement arrangements.

The Plans are hereby restored, effective immediately, to their pretermination status as of January 13, 1987.

This means that the Plans are ongoing since that date for all purposes, including accruing of benefits, vesting, and minimum funding obligations. Benefit payments to retirees that were reduced because of the terminations shall be restored to their full amounts under the terms of the Plans, and the Plans shall pay to such retirees any amounts that were not paid because of the terminations, together with interest at the rate specified in 29 C.F.R. § 2623.11(d).

Payments to retirees may not be delayed or withheld as a result of restoration. The Plans currently have sufficient cash to make the next five scheduled benefit payments without liquidation of any assets.

Also effective immediately, The LTV Corporation is plan administrator of the restored Plans with all of the fiduciary duties and obligations of a plan administrator under ERISA and under the terms of the Plans.

This determination is effective on the date and at the time it is issued and is not subject to administrative review by the PBGC under 29 C.F.R. Part 2606.

Issued this 22nd day of September 1987, at 10:30 a.m. in Washington, D.C.

PENSION BENEFIT GUARANTY CORPORATION

/s/ Kathleen P. Utgoff
KATHLEEN P. UTGOFF
Executive Director

[UAW LOGO]

INTER-OFFICE COMMUNICATION

December 8, 1981

To U. S. Staff

From Douglas A. Fraser

Subject Attacks on Negotiated Pension Plans

Some employers are using the current difficult economic period as an opportunity to attack existing negotiated pension plans (as well as to resist any plan improvements). In some cases these efforts are part of the employer's claim that it faces financial hardship, or even bankruptcy, if the pension plan is not terminated or otherwise curtailed.

As a general rule, any such "hardship plea" by the employer must be evaluated on its merits. In particular, the company should be willing to "open its books" and answer any relevant questions posed by the International Representative or by the UAW technical staff. Similarly, any decisions regarding pension plan changes are collective bargaining decisions, which must be made by the Local and International negotiators in light of the specific circumstances involved.

This memo supplements those general comments by focussing on some particularly objectionable proposals, regarding pension plans, that are being made by employers.

One such proposal is to terminate an existing negotiated plan, on the theory that the workers involved can be protected by a combination of government guaranteed benefits, and negotiating a new pension plan which will provide any non-guaranteed benefits. Aside from any other objections to that type of proposal, the government agencies involved have made it clear that they will not approve such a replacement scheme. Therefore, the negotiators involved must review any such proposal very carefully (and the International Representative can obtain

advice from the Social Security Department), so that they fully identify all of the risks which may be present.

The proposals of this type, which we are aware of, relate to the establishment—under ERISA (the Employee Retirement Security Act of 1974)—of the PBGC (Pension Benefit Guaranty Corporation). PBGC guarantees that certain benefits—which are generally less than the full amount called for by the pension plan—will be paid if a pension plan terminates. Those benefits are usually more than can be provided by the assets in the pension fund, so the employer might be able to save money if it shifts those unfunded liabilities to the PBGC, rather than having to make the necessary past service contributions to the pension fund. (Since the PBGC would have a right to recover some of its costs from the employer, the proposal is only likely to be made by a company which has a low net worth.) The employer then proposes to establish a new—less expensive—pension plan which is supposed to provide the benefits that are not guaranteed by PBGC. In short the employer claims that it can shift some of its pension cost to the PBGC, without adversely affecting benefits of the workers involved.

There are, of course, public policy considerations in any arrangement which would increase the strain on PBGC. As you may recall, the UAW originated the idea of federal reinsurance for pension plans. We are very conscious of the difficulties encountered during the fight—which took more than 10 years—to get that program enacted, and that our enemies would be happy with any excuse—especially in this political climate—to attack or unduly restrict PBGC.

In addition, PBGC has taken legal action, in the cases we are aware of, to prevent implementation of the arrangement described. PBGC has either refused to assume the obligations of the terminated pension plan, or it has insisted upon restrictions which would prevent the new

plan from providing adequate replacement benefits; in one case, it has even insisted that no replacement plan be adopted for several years.

Therefore, if an employer makes such a pension plan termination and replacement proposal, UAW negotiators should be aware that is not a desirable or feasible approach. There are alternatives which could be considered; for example, if the employer is unable to meet the pension funding requirements without incurring substantial business hardship, the IRS may waive all or part of the minimum funding requirements for a plan year. During such waiver period, however, the plan may not be amended to increase benefits and thereby increase plan liabilities.

It is never easy to bargain with an employer which is in financial hardship. However, we must not be led into apparently painless "solutions" without recognizing their consequences.

Another danger to our negotiated pension programs has been increased by the new tax legislation. Starting in 1982, all individuals may take a tax deduction for voluntary contributions to an IRA (Individual Retirement Account). Each worker will have to decide, before filing a 1982 tax return (which is due in April 1983 for most people), whether that provision is useful to him or her, and we will be supplying more information about that in the future. However, it appears likely that employers will promote that idea or other money purchase arrangements, in lieu of defined benefit plans or as an excuse to resist improvements in benefits for current plans. These IRAs are essentially restrictive savings devices, and they should not be considered as substitutes for pension plans or even perceived as supplements. Any suggestions that we use workers' tax deductible contributions to beef up pension benefits should be viewed with great caution and suspicion. The long term consequences to our benefit packages may be very negative.

Just as an example of the employer arguments you may encounter, many advocates of IRAs (or other money purchase arrangements) are calculating that if a 40 year old worker sets aside $2,000 yearly—which is the limit for a single person's IRA—and consistently earns 8% interest, the fund would accumulate to $146,000 by the worker's age 65. However, what is not pointed out is that—in order to put $2,000 in long term savings—a worker would probably have to be earning about $20,000 a year now and of course should be earning much more 25 years from now. To be consistent, if interest rates are assumed to be at 8% over the next 25 years,* it would have to be assumed that wages go up about that fast, so by age 65 that worker would be earning $137,000 yearly. Thus, while the IRA would produce a large fund (it should! $2,000 yearly is about $1 per hour), the retirement income it would provide would only be about 13½% of the worker's final pay, and would not include any arrangement for increases after retirement.

Employers will undoubtedly try to exploit the IRAs to divest themselves of pension responsibilities. An even greater problem may be the attempt by some reactionaries to try to use the IRA as an assault on the Social Security system by pitting young workers against older workers. We must guard against that; whatever any individual chooses to do regarding IRAs, or other retirement savings, all workers benefit from a strong Social Security system, supplemented by UAW-type defined benefit negotiated pension plans.

Circumstances may require modifications in existing pension plans, or special arrangements regarding new plans or amendments. Those should be approached carefully.

The services of the UAW Social Security Department are available to provide assistance to a National Department

* We certainty hope that won't happen! Workers are hurt, in many ways, by high interest rates.

or Regional Office in reviewing company proposals or developing counter proposals where changes are contemplated.

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cc: UAW International Executive Board

Supreme Court, U.S.
FILED
SEP 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-390

In the Supreme Court of the United States

October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

Response of Respondents David H. Miller and William W. Shaffer in Support of PBGC's Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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5 pp

Respondents Miller and Shaffer are plan participants in the Jones and Laughlin Retirement Plan. Miller and Shaffer intervened in the PBGC's enforcement action on behalf of a class of plan participants[1] to support the restoration of that pension plan. Miller and Shaffer agree with the PBGC that the decision of the court of appeals should be reviewed.

SUMMARY OF ARGUMENT

The PBGC in its petition has conveyed the importance of review for the future administration of the termination insurance system. Review is equally important to the intended beneficiaries of ERISA, the plan participants. The decision of the Court of Appeals directly affects the statutory protections accorded plan participants. Rather than remaining true to the Congressional purposes, the Court of Appeals departs from them and elevates bankrupt employers to a favored status that is without a statutory basis. Because the decision fundamentally alters the balance of interests struck by Congress, review is essential to determine whether the Congressional purposes underlying the legislation yield to the interests of bankrupt employers in time of financial uncertainty.

ARGUMENT

Through the provisions of the Single Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) (SEPPAA), Congress balanced the competing interests of the termination insurance system administered by the PBGC, the plan participants of single-employer defined benefit plans, and the employers

[1]After notices of appeal from the district court decision were filed by the PBGC and Miller and Shaffer, the district court certified a class of participants in the Jones and Laughlin Retirement Plan.

sponsoring those plans. The termination insurance system, because it benefits all plan participants, was accorded special protection by Congress. Section 4042, 29 U.S.C. §1342 (1982 and Supp. IV 1986) authorizes the PBGC to involuntarily terminate a plan when the PBGC determines that continuation of the plan threatens the long-run financial integrity of the termination insurance system. 29 U.S.C. §1342(a)(4). The PBGC may involuntarily terminate a plan even though the financial hardship confronted by the employer is not sufficiently severe to qualify for distress termination under Section 4041, 29 U.S.C. §1341(b). Absent a determination by the PBGC that the financial viability of the insurance system requires involuntary termination, Congress declared that the PBGC was "to encourage the maintenance and growth of single-employer defined benefit plans" and was "to increase the likelihood that participants and beneficiaries . . . will receive their full benefits." 29 U.S.C. §1001b(c)(2) and (3). Under the legislation, the Congressional preference for plan participants yields to the interests of employers only in cases of severe hardship. 29 U.S.C. §1001b(c)(4). The insurance system must absorb the unfunded liabilities and the plan participants must accept benefit payments at guarantee levels only when the employer satisfies the distress criteria of Section 4041(c)(2)(B)(ii) and (iii), 29 U.S.C. §1341(c)(2)(B)(ii) and (iii).

The PBGC's petition describes the perceived imminent threat to the termination insurance system that prompted the PBGC to seek involuntary termination in January 1987. Equally true the PBGC demonstrates that the perceived threat to the pension insurance system dissipated with time and events such that in September 1987 the PBGC determined that restoration under Section 4047

was appropriate. Once the PBGC concluded that the threat to the insurance system had abated, the operative Congressional policies mandated restoration by the PBGC. The employer could not satisfy the distress criteria necessary for voluntary distress termination. *See* AR 407-10. Because the plans could not be voluntarily terminated by the employer, interests of plan participants were to be furthered by restoring the plans.

The Court of Appeals' decision undermines that policy and elevates the employer's interest over that of plan participants in the context of restoration. The requirement placed on the PBGC to demonstrate long term financial stability before restoration of a terminated plan shifts the burden Congress assigned to the employer in the distress provisions.

Not only does the decision impair the PBGC's administration of the pension insurance system, but it relegates plan participants to a position subservient to the employer. The decision of the Court of Appeals minimizes the interests of plan participants that Congress plainly sought to protect. Rather than require the employer ineligible for distress termination to continue a pension plan during a period of financial uncertainty, plan participants must suffer the loss of promised pension benefits until the PBGC establishes that it is certain the employer will be able to fund the plan into the foreseeable future. The decision is thus fundamentally at odds with the clearly articulated Congressional policy requiring the employer to fulfill pension promises to plan participants until the employer demonstrates the severe hardship necessary for distress termination.

CONCLUSION

The PBGC's petition for certiorari should be granted.

Respectfully submitted

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OCTOBER TERM, 1989

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v.

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Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BY RESPONDENTS THE LTV CORPORATION, LTV STEEL COMPANY, INC., THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES, AND THE LTV BANK GROUP

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QUESTION PRESENTED

The question presented by the Pension Benefit Guaranty Corporation (PBGC) is argumentative and has no basis in the acfual holdings made by a unanimous panel of the Court of Appeals for the Second Circuit (Van Graafeiland, Meskill and Miner) affirming in full the decision of the District Court for the Southern District of New York (Sweet, J.), which vacated the PBGC's Notice of Restoration and remanded the matter to the agency. An accurate description of the question presented by the decision below is as follows:

1. May a reviewing Court vacate and remand the PBGC's Notice of Restoration, based, in the agency's words, "on LTV's establishment of abusive follow-on plans," and "its financial improvements," PBGC's Petition for Certiorari at 11, where nothing in ERISA prohibits the establishment of "follow-on" plans, and the administrative record:

a. provided no support for the agency's conclusion that the plans established by LTV were abusive "follow-on plans";

b. established that the agency failed to consider the federal bankruptcy law and labor law policies affected by restoration;

c. established that the agency's "financial improvement" rationale had several fundamental gaps in reasoning;

d. established that the agency did not consider LTV's status as a debtor in bankruptcy in assessing LTV's "financial improvement";

e. established that the agency did not assess the possibility that the restored plans would have to be re-terminated; and

f. established that the agency did not apprise LTV of the material on which it would base its decision, give LTV an adequate opportunity to offer contrary evidence, proceed in accordance with ascertainable standards nor provide a statement showing its reasoning?

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STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, see

Pet. App. 133a-157a; the Bankruptcy Code, 11 U.S.C. §§ 1113, 1114; and the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), see Appendix A to this Brief.

PRELIMINARY STATEMENT

The petition should be denied. As the agency concedes, since the PBGC involuntarily terminated the LTV plans, Congress has enacted substantial amendments to ERISA going to the very policy issues the agency claims are implicated by the decision in this case. In doing so, Congress specifically rejected proposed prohibitions of follow-on plans. These substantial amendments seriously undercut the agency's policy arguments in support of its petition. Furthermore, these amendments — which are not applicable to this case — make this case a poor vehicle for this Court to delve into the statutory complexity of ERISA.

Moreover, the decision below is correct and raises no issues calling for review by the Court. In opinions carefully tied to the complex facts of this case, both the District Court and a unanimous panel of the Court of Appeals found on numerous independent bases that the action of the PBGC was arbitrary and capricious. Neither court had to deviate from, or even significantly elaborate upon, well-established principles of administrative law in reaching this result, because the agency's action failed to meet even the most minimal standards of reasoned decision making. Neither court "substituted" its judgment for that of the agency, because as to numerous factors clearly relevant to the restoration decision both courts found that the agency had performed *no* analysis and established *no* ascertainable standards. Under basic principles of administrative law, a remand to the agency was required.

STATEMENT OF THE CASE

LTV's Bankruptcy and PBGC's Involuntary Pension Plan Terminations

On July 17, 1986, LTV, LTV Steel and its affiliates filed Chapter 11 petitions. LTV Steel was in 1986 the second largest steel company in the United States, created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation. Pet. App. 37a. However, the pressures of surviving in an industry battered by foreign competition proved too much, and by 1986 LTV was suffering from record losses in the steel business, a weak dollar, declining steel shipments and the tightening of LTV's credit. It was faced with impending defaults under its credit agreements, and its bank lines had been terminated. AR 237-238, 706-706.

After the filings, LTV continued to operate its businesses for the benefit of its creditors and security holders. LTV's objective as a debtor in Chapter 11 is to reorganize and streamline its businesses so as to maximize their value in order that its thousands of creditors, including the PBGC, may receive a fair and equitable recovery in a plan of reorganization. A normal and foreseeable objective in Chapter 11 is to accumulate cash, since a debtor may not pay its prepetition debts except pursuant to a plan of reorganization or court order. Since the filing LTV has accumulated millions of dollars which must be used to settle the billions of dollars of claims of all of its creditors.

At the time it filed its Chapter 11 petition LTV bore massive pension and other obligations. Each steel company had brought its pension obligations to the merged entity. To reduce costs and improve efficiency, LTV Steel had shut

down extraneous facilities, triggering its obligations to those laid off. Pet. App. 37a. As a result, LTV Steel's growing pension and retiree health liabilities rested on an ever shrinking base. By 1986 LTV Steel's 24,544 active workers supported 77,182 retirees, three retirees for each worker. *Id.* Calculated under ERISA, the total present value of LTV Steel's unfunded past service liabilities for pension costs attributable to pre-Chapter 11 benefits was estimated in 1986 to exceed two billion dollars. *Id.*

Shortly after the filing, LTV Steel approached the USWA to seek renegotiation of the 1986 collective bargaining agreement. AR 238. Because the hourly pension plans were established pursuant to a USWA collective bargaining agreement, ERISA prevented LTV Steel from terminating its hourly pension plans without first bargaining with the USWA. 29 U.S.C. § 1341(a)(3) (Supp. IV 1986). The USWA was adamantly opposed to renegotiation and would not support termination of the pension plans. *Id.* At the same time, LTV was prohibited as a matter of bankruptcy law from making contributions to the pension plans relating to pre-petition service. Each month, thirty-one million dollars was being paid out of the plans. Each day uneconomic facilities closed and liabilities increased. AR 2.

In September, 1986 one of the salaried plans, the Republic Retirement Plan, ran out of assets. The PBGC moved under the involuntary termination provisions of ERISA to terminate the plan. AR 1. On January 12, 1987, to "avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the liability of the PBGC's insurance funds," the PBGC involuntarily terminated three other plans. Pet. App. 42a. At that time, the PBGC projected that as a result of LTV's Chapter 11 status LTV would accumulate "just over $1 billion by the end of 1988," but understood that

such cash could not be sufficient to both "finance a plan of reorganization and the ongoing [pension] Plans." AR 4. LTV consented to the terminations. Pet. App. 42a. The PBGC then filed claims exceeding two billion dollars against each of the debtors, and continued its already intense involvement in the reorganization process. If the plans remain terminated, those claims, along with those of all other creditors, will be paid pursuant to a plan of reorganization. The PBGC is aware that LTV and its unsecured steel creditors have offered to pay the PBGC a substantial sum pursuant to such a plan.[1]

The 1987 Interim Labor Agreement

The PBGC's involuntary terminations caused severe loss of pension and other employee benefits to approximately fifteen percent of LTV Steel's retirees. Active workers not only lost benefits under the terminated plans, they also had no vehicle for the accrual of pension benefits for service performed following termination. Pet. App. 42a; AR 479-480. The USWA opposed the terminations, appealed the termination orders, Pet. App. 43a n.9,[2] and initiated a lawsuit in the Bankruptcy Court alleging that LTV Steel had violated the labor contract and Section 1113 of the Bankruptcy Code. Pet.

1. The dispute over the PBGC's claims to which the agency alludes, PBGC Pet. Cert. 8 n.8, is over the status and amount of the claims. Whatever the outcome, the PBGC's recovery will be substantial, not "a few cents on the dollar," PBGC Pet. Cert. 16 n. 14.

2. The PBGC defended the terminations before the Court of Appeals for the Second Circuit, which on July 17, 1987 affirmed the involuntary termination orders. *Jones & Laughlin Hourly Pension Plan* v. *The LTV Corp.*, 824 F.2d 197 (2d Cir. 1987) and *Jones & Laughlin Retirement Plan* v. *The LTV Corp.*, 824 F.2d 202 (2d Cir. 1987).

App. 8a; AR 694.

The plan terminations provided the impetus for renewed bargaining between the USWA and LTV Steel. LTV Steel was concerned that the USWA might strike, at a cost to LTV of $100 million per month.[3] Pet. App. 8a; AR 1574. After weeks of intense and complicated negotiations, an interim agreement was reached in which the USWA made significant concessions in many areas which ultimately would generate annual savings to LTV Steel of approximately $50 million. Pet. App. 45a. In return, LTV Steel agreed to an array of new programs designed to replace some of the benefits lost as a result of the involuntary terminations of the pension plans.[4]

3. LTV's concern that the USWA might strike was well-founded. The USWA had struck the Wheeling-Pittsburgh Steel Company, another Chapter 11 debtor, in part for its failure to pay post-termination pension benefits, and had just concluded a six-month strike at USX Corporation, the nation's largest steel company. Pet. App. 43a. Indeed, at the very beginning of the LTV cases the USWA had struck LTV Steel's most important facility in response to LTV Steel's initial inability to pay retiree medical benefits. *In re Chateaugay Corp.*, 87 B.R. at 779, 789 (S.D.N.Y. 1988). LTV Steel had quickly obtained court authority to pay these benefits. *In re Chateaugay Corp.*, 64 B.R. 990 (S.D.N.Y. 1986) (MJL), and Congress had unanimously passed a statute requiring full payment of retiree health benefits. See Pub. L. No. 99-591, 100 Stat. 3341, amended by Pub. L. No. 100-41, 101 Stat. 309 and by Pub. L. No. 100-99, 101 Stat. 716; see also Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified in part at 11 U.S.C. § 1114).

4. The programs implemented in the interim agreement include not only replacement pension benefits for both active employees and retirees, but also programs for the payment of benefits to workers who are disabled, to spouses of employees who die while in active service, and to workers who lose their jobs as a result of plant shutdowns and who do not yet qualify for Social Security benefits. Pet. App. 45a; AR 242-246. The new programs, which do not provide a full recovery of the level of benefits lost, also differ substantively from those provided under the terminated plans, most notably in that none of these programs is guaranteed by the PBGC. The plans established by the 1987 collective bargaining agreement will be referred to hereinafter as the "CBA Plans."

Id. The agreement is expressly designed as an interim arrangement. *Id.* A new labor agreement must be negotiated to govern the parties' post-confirmation relationship, and that agreement will be the subject of bargaining as a plan of reorganization is completed with all of LTV Steel's creditors. AR 241.

When the PBGC learned of the agreement, the agency took the position that unspecified aspects of the proposed agreement violated a PBGC "policy" against post-termination benefits and therefore was abusive. LTV Steel, the PBGC and the USWA held several meetings in July 1987 in an effort to clarify and resolve the PBGC's objections to the proposed agreement. Pet. App. 49a-50a. The PBGC was unwilling or unable to specify its objections to the collective bargaining agreement. AR 523-524, 658. The validity of the post-termination programs was the only matter at issue; LTV Steel's financial status was not discussed. Pet. App. 125a-126a.

Bankruptcy Court Approval Of The 1987 Interim Agreement

LTV Steel, with the support of its major creditor constituencies and the USWA, promptly sought approval of the interim labor contract. The PBGC opposed approval. At the hearing before Chief Bankruptcy Judge Lifland on LTV Steel's application, LTV's witnesses testified without contradiction that the interim agreement was necessary to avoid a crippling strike and to permit LTV and LTV Steel to

reorganize. Pet. App. 45a.[5] On July 16, 1987, the Bankruptcy Court approved the interim agreement, exercising its equitable powers under Section 105 of the Bankruptcy Code to ensure the success of reorganization.

> "Based upon the complete record before me today, including all filed papers, it has become abundantly clear that this Court may and should utilize its equitable power to authorize the terms and payments contemplated by the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor." Pet. App. 46a.

The Bankruptcy Court expressly held that its ruling was an interim order addressing the needs of the ongoing reorganization. AR 624.[6]

Restoration

Eight times the PBGC attempted without success in the Bankruptcy Court, in the District Court and in the Court of Appeals to stay approval and implementation of the collective bargaining agreement. The PBGC appealed the order

5. The financial advisor to the Creditors' Committee, called by the PBGC, testified that he did not believe that a better agreement could have been reached, AR 554; that LTV Steel would nevertheless have difficulty surviving, AR 546-548; but that the "bet the company" risk of a strike was unacceptable. AR 549.

6. Consistent with earlier rulings by the Bankruptcy and District Courts with respect to payment of other retiree benefits, the Bankruptcy Court found that consideration of the PBGC's claims of ERISA "abuse" or "illegality" was premature, id., and held in any event that it was empowered under Section 105 to authorize interim payments so that LTV Steel's reorganization process might continue. AR 623-624.

approving the interim agreement to the District Court, raising its abuse argument. After LTV moved to dismiss the appeal, the agency withdrew the appeal and abandoned further efforts to obtain judicial vindication of its asserted policy against follow-on plans. At the same time, the PBGC was attempting, unsuccessfully, to obtain Congressional sanction for its policy. See Point I *infra*. Following these actions, the PBGC held a fifteen minute telephone meeting of the PBGC's Board of Directors, the first meeting in eight years, AR 598, in which the Board gave blanket approval of any restoration action the PBGC Executive Director chose to take with respect to any company. Pet. App. 47a. The Executive Director then sent LTV the first Notice of Restoration ever issued by the PBGC. AR 1578-1579. The notice purported to restore three of the four terminated plans, and failed to explain why the fourth, to which the same theories could be applied, had not been restored. Pet. App. 125a.

The PBGC's Analysis

The PBGC asserted three bases for restoration: (1) LTV Steel's "abuse" of ERISA in establishing the post-termination programs negotiated with the USWA and approved by the Bankruptcy Court; (2) "LTV Steel's improved financial circumstances;" and (3) "LTV Steel's demonstrated willingness to fund employee retirement arrangements." AR 1578. No further explanation or analysis was set forth in the Notice.

As the District Court and the Court of Appeals found, the administrative record reveals a haphazard process of inadequate factual development and faulty analysis. The voluminous appearance of the "administrative record" is deceiving. The PBGC relied upon fewer than ten pages to explain its administrative action. Fewer than forty pages reflect

regulatory consideration as opposed to pre-existing documents relating to creditor/adversary action. AR 1-14a, 637-645, 1154-155, 1577-1584. The basis for the PBGC's finding of "abuse" is set forth in three conclusory paragraphs of one PBGC affidavit. AR 224-225. Three pages of another document record a rudimentary financial "analysis," comparing a projection of LTV Steel's cash flow and minimum cash needed to fund the pension plans. AR 12-13.

The PBGC's administrative record shows that both the terminations and restoration were based on the same two-year business plan, Pet. App. 112a-113a, even though the PBGC knew that a revised business plan would be made available within days of the restoration decision. Pet. App. 128a n.46. With reference to that two year business plan, the PBGC staff stated at the first meeting to discuss restoration, that at the time of termination a "financial analysis presented to the group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding requirements." Pet. App. 113a n.37. The only additional information considered at the time of restoration was LTV Steel's performance and its accumulation of cash in the first five months of 1987. Pet. App. 113a.

The Decision Below

The PBGC filed a complaint in the Southern District of New York seeking enforcement of its administrative restoration, and moved for summary judgment. On June 22, 1988, District Judge Sweet issued an opinion denying summary judgment and vacating the Notice of Restoration. *In re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988), Pet. App. 28a. Judgment remanding the matter to the agency was entered on September 13, 1988. Pet. App. 132a. The PBGC appealed the decision to the Court of Appeals for the Second

Circuit, which issued a decision affirming the District Court. The Court of Appeals found the PBGC's restoration of the LTV plans arbitrary and capricious on numerous grounds:

(1) the agency did not "adequately consider[] the policies and goals of the bodies of law involved in this case" - ERISA, bankruptcy law and labor law - "and their interaction with each other," Pet. App. 17a.

(2) "Even when we examine the factors upon which PBGC did base its decision, we find no support in the administrative record for the conclusion reached," Pet. App. 17a, specifically finding that:

(a) the PBGC had no support in the administrative record for its conclusion that the CBA Plans were abusive "follow-on" plans. Pet. App. 19a.

(b) the PBGC "financial improvement" rationale was based on "fundamental, yet unexplained and unexamined assumptions." Pet. App. 22a.

(c) the PBGC "did not effectively assess the impact that LTV's status on a debtor in Chapter 11 reorganization had on its financial condition." Pet. App. 23a.

(d) "[N]owhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated." Pet. App. 25a.

(e) "PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards . . . nor provided a statement showing its reasoning in applying those standards." Pet. App. 26a.

THE PETITION SHOULD BE DENIED

POINT I

Substantial and Directly Relevant Amendments to ERISA Have Been Enacted Since Termination of the LTV Plans

As the PBGC concedes, since the PBGC involuntarily terminated the LTV Plans, ERISA has been substantially amended specifically to address the policy concerns that the PBGC claims are implicated by the decision below. The Pension Protection Act of 1987 ("PPA") "substantially tightened ERISA's statutory minimum funding requirements," PBGC Pet. Cert. 16 n.14, "increased the liability owed to the PBGC by employers who terminate underfunded plans to 100 percent of benefit liabilities," *id.*, and made it substantially more difficult for employers voluntarily to terminate underfunded plans, requiring that an employer be in reorganization proceedings, that the bankruptcy court approve the termination, and that the termination be necessary to permit the employer to continue in business. *See* Pension Protection Act of 1987, subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330; 29 U.S.C. §§ 1341 (c)(2)(B), 1362(b)(2)(A) (West Supp. 1988). By making it more difficult to terminate underfunded plans, these amendments protected the agency from abusive terminations. In the process leading to the passage of the PPA, Congress considered and rejected a provision proposed by the PBGC which would have established a five-year prohibition on the establishment of follow-on plans following a voluntary distress termination.[7]

7. *See* H.R. Rep. No. 391(II), 100th Cong., 1st Sess., 1010, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-378, 2313-627; H. Conf. Rep. No. 495, 100th Cong., 1st Sess., 881-885, *reprinted in* U.S. Code Cong. & Admin. News 2313-1627-1631.

These substantial amendments undermine the PBGC's claim that its policy concerns justify the Court's intervention into this case. More fundamentally, even if one were to accept the PBGC's policy concerns, these subsequent amendments make this case an especially poor vehicle for an analysis of ERISA. This Court has recognized that in interpreting a statute such as ERISA the court must consider the objects and policies of the whole law, and the interrelationships among its sections. *See, e.g., Pilot Life Ins. Co.* v. *Dedeaux,* 481 U.S. 41, 51 (1987). It is entirely inappropriate for this Court to undertake an analysis of a statute as complex as ERISA, *see, e.g., Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U.S. 724, 740 (1985), in a case in which directly relevant subsequent amendments do not apply.[8]

Remarkably, the PBGC asserts that this Court should review this case because "PBGC has no experience under the new law to indicate how it will be interpreted by the courts." PBGC Cert. Pet. 16 n.14. This is precisely the reason certiorari should be denied. This Court is not a court of first resort.

8. There is no conflict among federal courts of appeals on the questions presented by this case. As the PBGC noted, the only other case raising similar issues has so far resulted in bankruptcy court recommendations in agreement with the holdings of the District Court and the Court of Appeals in the present case. *USWA* v. *PBGC (In re Wheeling-Pittsburgh Steel Corp.),* Bankr. No. 85-793, Civil No. 87-355 (W.D. Pa. June 30, 1989). As in the present case, the recent amendments to ERISA are not applicable to the plans terminated in *Wheeling-Pittsburgh.*

POINT II

Consistent With Fundamental Principles of Administrative Law, The Decision Below Remanded the Restoration Notice to the Agency Because the Agency's Action was Arbitrary and Capricious

The Court of Appeals, affirming the District Court, vacated the Notice of Restoration and remanded the matter to the agency because the agency had failed entirely to explain how the CBA Plans constituted an "abuse" of the pension insurance program, and had failed to consider a host of fundamental factors specific to the present case. In remanding the matter to the agency to explain its actions and to consider those factors it had failed to consider in the first instance, the court was performing its well-established obligations under basic principles of administrative law.[9]

9. Judicial review of agency action under the "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), "mandates a searching inquiry into the facts and their relationship to the articulated basis for an agency's action." 87 B.R. at 807. The court must engage in a "thorough, probing, in depth" plenary review to determine whether the agency's decision-making process was reasoned, took into account all relevant policies and information, and reached a result consistent with Congressional intent. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416-417 (1971); *Sierra Club* v. *United States Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985). A reviewing court must determine whether the agency's stated explanation for its action is "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Belland* v. *Pension Benefit Guaranty Corp.*, 726 F.2d 839, 845 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984). Exacting judicial review is necessary to safeguard against action in which "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,

In order to characterize the decision below, whose numerous independent bases are carefully tied to the facts of this case, as suitable for review by this Court, the PBGC repeatedly claims that the Court of Appeals "substitute[d] its judgment" for that of the agency, PBGC Pet. Cert. 20, imposed "an unreliable financial standard" on the agency, PBGC Pet. Cert. 13, and imposed its own balancing of ERISA against bankruptcy and labor law. The Court of Appeals did not substitute its analysis for that of the PBGC, or inappropriately impose particular standards on the PBGC. Rather, as to numerous factors clearly relevant to the restoration decision the Court of Appeals found that the agency had performed *no* analysis and established *no* ascertainable standards. No deviation from fundamental principles of administrative law was required to find the PBGC's action arbitrary and capricious. The holdings of the District Court and the Court of Appeals, while based on a thorough consideration of the complex facts of this case, were not difficult to reach as a matter of law. The administrative process reflected in the PBGC's action was the very antithesis of appropriate agency procedures.

offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it would not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. These were the standards applied by the District Court and the Court of Appeals in this case, and the application of these standards mandated that the Notice of Restoration be vacated and the matter remanded to the agency.

A. The PBGC Abuse Rationale For the Restoration of the LTV Plans Has No Statutory Basis and No Support in the Administrative Record

The Court of Appeals found the agency's conclusion that the CBA Plans were an "abuse" of the pension insurance system arbitrary and capricious because:

(1) nothing in ERISA prohibits the provision of benefits in excess of those guaranteed by the PBGC;

(2) the CBA Plans directly resulted from fundamental bankruptcy and labor law policies requiring collective bargaining concerning pension benefits;

(3) the agency had provided no detailed showing that the CBA plans were in fact abusive "follow-on plans"; and

(4) the agency's three unpublished opinion letters did not state an ascertainable standard that could be stretched to cover the CBA plans.

Thus, the Court of Appeals found that the PBGC's "abuse" rationale for its LTV restoration decision had no statutory basis in ERISA, bankruptcy law or labor law, and was not supported by any ascertainable standard or adequate analysis. This holding is correct, is tied to the specific circumstances of this case and raises no issue appropriate for review by this Court.

Section 4047 requires that restoration be based on a determination by the agency that such action is "appropriate and consistent with its duties" under Title IV of ERISA. In determining the appropriateness of such action, it is well-established that an agency must give consideration to competing policies if its actions implicate national policy beyond its

area of expertise. Any possible conflict must be recognized, and any agency action must be narrowly drawn to accommodate such national policies. *See, e.g., Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 172-74 (1962); *LaRose* v. *FCC,* 494 F.2d 1145, 1146 n.2, 1147-50 (D.C. Cir. 1974). Therefore, in reviewing the PBGC's decision to restore three of the four LTV Plans it involuntarily terminated — which decision was based on LTV's establishment, after reaching a collective bargaining agreement, of interim plans existing for the duration of LTV's bankruptcy — a court must consider ERISA, bankruptcy law and labor law.[10] In so doing, the District Court and the Court of Appeals found no evidence in the language or legislative history of Title IV that the provision of benefits beyond what is guaranteed by the PBGC is impermissible, a finding that the PBGC does not now dispute.[11]

10. No deference is to be given an agency's interpretation of a statute where, as here, "it interprets another agency's statute or resolves a conflict between its own statute and the statute of another agency." *Department of the Navy* v. *Federal Labor Relations Authority,* 836 F.2d 1409, 1410 (3d Cir. 1988); *see also New Jersey Air National Guard* v. *Federal Labor Relations Authority,* 677 F.2d 276, 281-82 n.6 (3d Cir. 1982) ("While we place considerable weight on the interpretation of the Labor-Management Act rendered by the FLRA, we are not obligated to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes"); *Parola* v. *Weinberger,* 848 F.2d 956, 959-960 (9th Cir. 1988); *cf., Lieberman* v. *Federal Trade Commission,* 771 F.2d 32, 37 (2d Cir. 1985). Even as to an agency's own enabling legislation, "[t]he judiciary is the final authority on issues of statutory construction." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 n.9 (1984); *In re Chateaugay,* 87 B.R. at 812; *see also Immigration and Naturalization Service* v. *Cardoza Fonseca,* 107 S. Ct. 1207, 1220-21 (1987).

11. Indeed, as the District Court observed, the PBGC has taken precisely this position in other litigation. In *Murphy* v. *Heppenstall Co.,* 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1982), a group of retired USWA employees sued their employer following the involuntary termination by the PBGC of a pension plan, seeking payment of the difference

The District Court and the Court of Appeals also recognized, and the PBGC also does not dispute, that the CBA Plans, in the specific context of the LTV bankruptcy and LTV's collective bargaining obligations, were consistent with federal bankruptcy and labor law policies. Under these circumstances the Court of Appeals correctly found that the PBGC's "abuse" rationale for the restoration of the LTV plans had no statutory basis.

The District Court and the Court of Appeals did not "substitute" their judgment for that of the PBGC in reaching this holding, because, as the District Court decision affirmed in full by the Court of Appeals makes clear, the agency *did not even consider* the significance of LTV's bankruptcy or of its collective bargaining obligations; neither did the administrative record provide any explanation of why the provision of non-guaranteed benefits constituted an "abuse" of the pension insurance system.[12]

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between guaranteed and non-guaranteed benefits. The PBGC as amicus supported the employees' right to recover directly from the employer, arguing that ERISA did not void existing pension contracts and did not impose a cap on the payment of non-guaranteed benefits. "[A]n employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA." PBGC Amicus Br. in *Heppenstall*, p.3. "The Record does not indicate that the PBGC considered the holding of *Heppenstall* and the position it took in that case in reaching its conclusion that the 1987 CBA Plans constituted an abuse of Title IV." Pet. App. 106a.

12. *See, e.g.*, Pet. App. 102a ("the Record reveals that the PBGC's decision on the abusiveness of the 1987 CBA Plans did not take into consideration the fact that the 1987 CBA resulted in large part from LTV Steel's legal obligations under section 1113 of the [Bankruptcy] Code and the USWA's pursuit of its rights under federal labor law"); Pet. App. 109a-110a (District Court, referring to argument in PBGC brief that "it could become routine for employers to file for bankruptcy primarily to escape their pension benefit obligations," observed that the argument "is unsupported by any facts or even expert opinion in the Record, and the

The PBGC's failure even to consider the substantial federal policies affected by its Restoration Notice renders its action arbitrary and capricious. This Court's ruling in *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984), and its legislative aftermath illustrate both the weight ascribed by this Court to the fundamental principles of bankruptcy reorganization and the special recognition given labor law. In *Bildisco,* this Court recognized the "special nature of a collective-bargaining contract," but ruled that collective bargaining agreements were not to be treated in a reorganization case differently from other contracts. 465 U.S. at 527. In response, Congress enacted Section 1113, which imports fundamental principles of labor law into the Bankruptcy Code and is intended to encourage the collective bargaining process. *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir.), *cert. denied* 479 U.S. 949 (1986). A debtor must negotiate in good faith over any proposed modification of a labor contract, *Truck Drivers Local 807* v. *Carey Transportation, Inc.*, 816 F.2d 82, 89 (2d Cir. 1987), including retiree benefits. *Century Brass,* 795 F.2d at 274; *Allied Chemical & Alkali Workers of America, Local Union 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971); *Connecticut Light & Power Co.* v. *NLRB*, 476 F.2d 1079, 1081 (2d Cir. 1973).

However, Congress maintained the structural goals of reorganization in Section 1113. "[A]ll creditors, the debtor and all of the affected parties are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A). "The purpose of this provision

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Record does not contain any analysis of the extent of any such threat, if realized").

. . . 'is to spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree.''' *Carey Transportation,* 816 F.2d at 90, quoting *Century Brass,* 795 F.2d at 273.

The PBGC now contends that it properly ignored this entire process, mandated by two weighty bodies of federal law, in making its restoration decision. Indeed, before the Court of Appeals the PBGC asserted that it was "not the PBGC's responsibility to consider Section 1113." PBGC Br. at 31. The PBGC's position blatantly violates this Court's expression of the importance of balancing "multiple, competing considerations" within Chapter 11, *Bildisco,* 465 U.S. at 525, and Congress' expressed mandate that the goals of labor law be given a special place in the Chapter 11 process.[13]

13. The District Court and the Court of Appeals also held that even if it were within the agency's discretion to find that the establishment of "follow-on" plans as part of a collective bargaining agreement entered into during bankruptcy proceedings constituted an "abuse" of the pension insurance program, the administrative record provided no support for the conclusion that the CBA Plans were "follow-on" plans. Both the District Court and the Court of Appeals found that the three unpublished PBGC opinion letters which the agency put forward to explain why the CBA plans were abusive "follow-on" plans "concerned cases that were 'too factually dissimilar from the instant case to be of substantial assistance here.''' Pet. App. 20a. In a footnote, the PBGC apparently asks this Court to determine itself whether the inclusion of "the plans themselves," *see* AR 230-303, and three paragraphs in an affidavit by the manager of the PBGC's Actuarial Policy Division, *see* AR 219, in the administrative record were sufficient to support the agency's conclusion that the CBA Plans were "follow-on" plans. PBGC Cert. Pet. 20 n.17. Why this issue is an appropriate one for review by this Court is not explained.

B. The Agency's Determination of "Financial Improvement" Has No Support in the Administrative Record

The District Court held, and the Second Circuit affirmed, that financial improvement is a basis for restoration. *See* Pet. App. 21a. Thus, on remand, the agency need only actually consider whether LTV Steel, consistent with its obligations under bankruptcy law, can fund the plans, or whether its inability to do so will result in re-termination.[14]

In reviewing the record thus far created, in accordance with its obligations as a reviewing court, the Court of Appeals looked to see if the agency had given *any* consideration to the most obvious question arising from restoration: will it lead to immediate re-termination? The agency had not, and the District Court and Court of Appeals appropriately found that the agency's failure even to consider this question was arbitrary and capricious:

> "*We note that nowhere in the administrative record is there any evidence that the PBGC assessed the*

14. This holding actually renders superfluous consideration of the agency's "abuse" basis for restoration. If financial improvement is a *necessary* condition for restoration — as it must be, since to "restore" plans to an entity that cannot afford them would be a meaningless exercise leading to immediate re-termination — and a *sufficient* condition for restoration — in that the agency need find nothing other than financial improvement to justify restoration — then the agency's discretion is as broad as it logically can be. As long as the agency can show relevant financial improvement, it can restore for any reason whatsoever, without further justification. If relevant financial improvement cannot be shown, restoration is inappropriate even if it is otherwise consistent with PBGC policy.

possibility that the Plans would have to be re-terminated. ERISA contains no special provisions governing re-termination; however, the standards would be the same as for initial termination. If in the near future LTV were once again found unable to adequately fund the Plans, the resulting vacillation in agency policy would lead to uncertainties on the part of the retirees, plan sponsors, creditors and the government. Such uncertainty is to be avoided where possible. *See New York Council, Ass'n of Civilian Technicians,* 757 F.2d at 508." Pet. App. 25a (emphasis supplied).

In making its restoration decision the agency was required to consider whether it would lead to re-termination (or justify its *post hoc* assertions on appeal that such consideration is impossible). ERISA does not intend that pension plans be ping pong balls ceaselessly batted between termination and restoration depending on short term factors. Section 4047 authorizes restoration only when restoration is consistent with the PBGC's duties under Title IV. Under Section 4042(a)(4) the PBGC must involuntarily terminate "as soon as practicable" a plan which has insufficient assets to meet current obligations. 29 U.S.C. § 1342(a) (Supp. IV 1986). It would be senseless to interpret Section 4047 to allow restoration where it is plain that a plan will have insufficient assets to meet current obligations and therefore must be re-terminated by the PBGC under ERISA § 4042.

To attempt to justify the intervention of this Court, the PBGC now distorts the Court of Appeals' holding on "financial improvement" into one which will make "restoration of any pension plan a virtual impossibility." Rather, the Court of Appeals properly held that five months' accumulation of cash by a company in bankruptcy is simply no indication of

"financial improvement"; it is merely an effect of the protections afforded by the reorganization process. Pet. App. 23a. Assuming arguendo that the agency may ignore bankruptcy *policy,* it cannot both ignore the *fact* of bankruptcy *and* rationally assess whether LTV's finances have improved. Indeed, both the inevitable accumulation of cash and a debtors' obligation to distribute it equitably among all of its creditors must be considered in any assessment of the debtor's ability to fund pension obligations. As the Court of Appeals observed, the purpose of the accumulation of cash in bankruptcy is to lead to a "fair distribution of the debtor's assets," with "each creditor receiving a proportionate share of the amount of its claim." The court held that the PBGC's claims were pre-petition claims of the same status as those of other general unsecured creditors, *citing Trustees of the Amalgamated Ins. Fund* v. *McFarlin's Inc.,* 789 F.2d 98, 103-04 (2d Cir. 1986). "Hence," the Court of Appeals explained, "any additional money that LTV has must be distributed fairly among the creditors, with the pension plans receiving no special priority." Pet. App. 23a-24a. Undoubtedly the failure of the agency to consider the fact of bankruptcy and the existence of thousands of other creditors with billions of dollars of claims to LTV's assets was arbitrary and capricious.[15]

15. Although these glaring gaps in the administrative record would themselves justify a remand to the agency, the holdings of the District Court and Court of Appeals that the agency's "financial improvement" conclusion was arbitrary and capricious were also based on additional instances in which the agency completely failed to even *consider* some of the most fundamental factors relating to LTV's supposed financial improvement:

(1) The agency assumed, without any explanation, that LTV would be able to obtain $600 million of funding waivers from the IRS when the IRS had previously denied LTV's waiver request for 1985 and had revoked its waiver for 1984, Pet. App. 115a; "The record dis-

C. The Court of Appeals' Procedural Holding Does Not Raise The Issue of Whether *Vermont Yankee* Is Applicable To Informal Adjudication

After holding that the agency had no statutory basis for its assertion that the CBA Plans constituted an "abuse" of the pension insurance program; that the agency had failed to even consider the fundamental federal policies affected by restoration; that the administrative record contained no reasoned analysis showing that the CBA Plans were "follow-on" plans; that the agency had concluded that LTV's finances had improved such that plans could be restored without ever considering whether the plans would be re-terminated shortly afterwards; and that the agency's financial analysis was riddled with basic lapses in reasoning, the Court of Appeals made the following observations concerning the method by which the agency had reached this arbitrary and capricious result:

> "In the instant case, PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a plan sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying those standards. Failure to do any of these things renders the decision arbitrary and capricious. . . .
>
> On remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the district court and to us, its decision cannot be upheld. Because PBGC's decision was not sustainable on the administrative record, the district court provided the appropriate remedy by vacating PBGC's Restoration Notice and remanding the matter to PBGC. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978); *Camp* v. *Pitts*, 411 U.S. at 143." Pet. App. 26a - 27a.

The present case does not raise the question "whether the principles of *Vermont Yankee* apply to informal adjudications like the PBGC's action in this case." PBGC Cert. Pet. 28. The Court of Appeals observed that the methods employed by the agency did not have the most minimal attributes of reasoned decisionmaking. Thus, citing *Vermont Yankee*, the Court of Appeals found that the appropriate remedy for the PBGC's arbitrary and capricious action was to remand the matter to the agency. Pet. App. 27a.

The Court of Appeals' observation that the method employed by the agency was arbitrary and capricious raises no issue appropriate for review by this Court. Two of the four failings listing by the Court of Appeals — the failure to

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closes no reason to believe that the IRS, after having denied previous waiver requests, would grant such requests in 1987." Pet. App. 22a.

(2) The agency assumed, without any explanation, that $50 million savings resulting from job reductions made pursuant to the 1987 Collective Bargaining Agreement would be retained in subsequent bargaining agreements even though the entire reason for the Union's concessions would be eliminated if the Plans were restored. Pet. App. 22a-23a.

The PBGC does not even attempt to argue that these findings of the District Court and Court of Appeals are erroneous, let alone that they raise any issues outside of the specific context of this case.

employ "ascertainable standards" or to provide "a statement showing its reasoning" — go to the substance of the administrative record rather than the procedures used to compile it. In mentioning the other two failings — the failure to apprise LTV of the material on which it was to base its decision, or to give LTV an adequate opportunity to offer contrary evidence — the Court of Appeals, far from "imposing . . . procedural requirements approximating those prescribed for formal adjudication," had merely observed that the agency had not taken the most minimal steps necessary to create an adequate agency record in the circumstance of this case. Even so, the Court of Appeals simply noted that the agency's failure to take *any* of the four steps listed was arbitrary and capricious. This holding is correct, is not in tension with any holding of this Court, and presents no question appropriate for review by this Court.

CONCLUSION

For the aforementioned reasons the petition should be denied.

Dated: October 11, 1989

Respectfully submitted,

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APPENDICES

APPENDIX A

OTHER STATUTES INVOLVED

11 U.S.C. § 1113

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section 'trustee' shall include a debtor in possession), shall-

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized

representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that-

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

PARENT CORPORATION, SUBSIDIARIES, AND AFFILIATES

Chateaugay Corporation
Reomar, Inc.
The LTV Corporation (parent corporation), f/k/a
  Kentron International Company,
  Jones & Laughlin Industries, Inc.
  and Lykes Corporation
LTV Steel Company, Inc. f/k/a/
  Jones & Laughlin Steel Corporation
  Jones & Laughlin Steel Incorporated
  Republic Steel Corporation
  Youngstown Sheet and Tube Company
  Republic Hibbing Corporation d/b/a
  LTV Steel Flat Roll and Bar Company
LTV Steel Tubular Products Company
  f/k/a LTV Tubular Products Company
  LTV Steel Specialty Products Company
  LTV Specialty Products Company
  Jones & Laughlin Steel Specialty
  Products Company, Inc.
LTV Sales Finance Company
LTV Aerospace and Defense Company
AM General Corporation
Amland Corporation
Bardale Coal Company
Barrel Corporation of West Virginia
BCNR Mining Corporation
Crystalane, Inc.
Crystalee

Dearborn Leasing Company
Erie B Corporation
Erie Development Company
Erie I Corporation
Erie Mining Company, a limited partnership
FC Divestiture Corporation
Georgia Tubing Corporation
Gulf States Steel Corporation
Halcorp, inc.
J.K. industries, inc.
J.W. Storage Company of Ohio
Jalcite I, Inc.
Jalcite II, Inc.
Jalore Mining Company, Ltd.
Jones & Laughlin Environmental Properties, Inc.
Jones & Laughlin Mining Company, Ltd.
Jones & Laughlin Ore Mining Company
Juddcorp. Inc.
Kentron Saudi Arabia, Inc.
LSC Leasing Inc.
Lorain Pellet Terminal Co.
LTV Education Systems, Inc.
LTV Electro-Galvanizing, Inc.
LTV Energy Products Company
LTV Holdings, Inc.
LTV International, N.V.
LTV Leasing, Inc.
LTV Properties, Inc.
LTVUS Corp.
Lykes Equipment Corporation
Lykes Leasing Corporation
National Telephone Systems, Inc.
Nemacolin Mines Corporation
Oil States Offshore Marine, Inc.

Oil States Rubber Co.
Repsteel Overseas Finance, N.V.
Republic Buildings Corporation
Republic Drainage Products Company
Republic Technology Corporation
Republic-Reserve, Inc.
Sierra Information Systems Corporation
a/k/a SISCOR
Sierra Research International Corporation
Technical Plastics, Inc.
Tuscaloosa Energy Corporation
Universal Time/Frequency, Inc.
Vought Industries, Inc.
Vought International, Inc.
Vought Overseas Ltd.
Vought Properties, Inc.
Youngstown Erie Corporation
YST Erie Corporation

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No. 89-390

IN THE

Supreme Court of the United States
OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC., THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

Response of Respondent, Official Committee of Equity Security Holders, in Opposition to Pension Benefit Guaranty Corporation's Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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HIPP

QUESTIONS PRESENTED

The LTV Corporation ("LTV Corp.") and its subsidiary, LTV Steel Company, Inc. ("LTV Steel") (collectively, "LTV"), are business entities attempting to reorganize under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (West 1979 & Supp. 1989), in part because of the extreme burden placed upon their operations by unfunded pension liabilities. Respondent, Official Committee of Equity Security Holders ("Equity Committee"), is an official committee duly appointed in the LTV reorganization cases to represent the interests of some 90,000 shareholders.

Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States government corporation, established pursuant to Section 4002 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1302, to administer the pension plan termination insurance program under Title IV of ERISA, 29 U.S.C. § 1001 *et seq.* (West 1982 & Supp. 1986).

After LTV filed for bankruptcy, the Internal Revenue Service ("IRS") refused to grant LTV a waiver of its pension plan funding obligations for 1985 and revoked a similar waiver for 1984. Subsequently, PBGC determined that LTV would be unable to fund its pension plans on a long-term basis, and terminated the three plans at issue effective January 13, 1987. Under the threat of a crippling strike, LTV Steel negotiated a new collective bargaining agreement granting some additional pension benefits for the duration of the reorganization. Despite the bankruptcy court's approval of this agreement, PBGC ordered the original pension plans restored to pretermination status on September 22, 1987. PBGC never explained how it determined that LTV Steel's financial condition had improved and never withdrew its prior conclusion that LTV Steel was incapable of funding the plans on a sustained, long-term basis. The questions presented are:

1. Should this Court grant the petition for certiorari when PBGC has failed to demonstrate that the existing assets of the three terminated LTV Steel pension plans are not capable of paying PBGC-guaranteed benefits under the Plans so that there is no economic justification for certiorari?

2. Should this Court grant the petition for certiorari when PBGC has failed to demonstrate that improvement of LTV Steel's financial circumstances between January, 1987, when PBGC had concluded that LTV Steel had no prospect of funding its plans on a long-term basis, and September, 1987, when PBGC ordered restoration, justified restoration of the plans?

3. Should this Court grant the petition for certiorari when PBGC has failed to demonstrate that LTV Steel's establishment of interim plans, for reasons of compelling economic necessity, pursuant to a collective bargaining agreement and bankruptcy court approval, is grounds for restoration of the original plans despite PBGC's failure to reverse its prior finding that the LTV Steel pension plans could not be funded on a long-term basis?

4. Should this Court grant the petition for certiorari at this time despite PBGC's failure — indeed refusal — to comply with the minimal procedures mandated by the Administrative Procedure Act, ("APA"), 5 U.S.C. § 551 *et seq.* (West 1982 & Supp. 1989), before reaching the conclusion that restoration of the plans was proper because of improvements in LTV Steel's financial circumstances?

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IN THE

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No. 89-390

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

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THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC., THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF THE LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

Response of Respondent, Official Committee of Equity Security Holders, in Opposition to Pension Benefit Guaranty Corporation's Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *Pension Ben. Guar. Corp. v. LTV Corp.*, is reported at 875 F.2d 1008 (2d Cir. 1989), and is reprinted at pp. 1a-27a of the Appendix to PBGC's Petition for Writ of Certiorari. The judgment of the United States District Court for the Southern District of New York, docketed September 13, 1988, from which appeal was taken, and the opinion of

the District Court, dated June 22, 1988 and reported at 87 B.R. 779, are reprinted at pp. 28a-131a of the same Appendix.

JURISDICTION

The PBGC invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 4002, 4042 and 4047 of ERISA, 29 U.S.C. §§ 1302, 1342 and 1347.

STATEMENT OF THE CASE

This case concerns the ongoing effort of LTV, its creditors and equity holders to restructure LTV's obligations — including its pension obligations — in a Chapter 11 case under the United States Bankruptcy Code.

PBGC's petition for certiorari would have this Court accept on faith the unproven premise that denial of the writ will create a national calamity — in which major corporations will routinely shift the burden of supporting their unfunded pension liabilities onto the back of PBGC — thereby causing a liquidity crisis for the insurance fund created by Congress to provide some pension coverage for workers left out in the cold when their employers closed their doors without funding their pension plans. Nothing in the record supports that view.

The problem of follow-on pension plan abuse arises when a healthy, solvent employer, having terminated a plan voluntarily, thereby triggering PBGC's pension insurance program, then offers a supplemental wrap-around retirement arrangement to its employees, with the result that they receive substantially the same benefits as were provided by the old

plan, partially paid for by PBGC. In such a case, PBGC is forced to fund an ongoing retirement program of a healthy business.

This case presents a problem PBGC has never addressed previously and has been unwilling to consider in a responsible manner throughout this action. That problem is whether a company like LTV Steel, compelled by economic necessity to seek bankruptcy court protection in order to confront its many financial problems and the burden of its pension obligations, can be found to have established abusive follow-on plans, if, after the original plans were involuntarily terminated, the company agreed to establish an interim plan limited to the duration of the reorganization. LTV Steel's interim pension plan was part of a collective bargaining agreement negotiated under the threat of a strike that would affect its ability to reorganize and was approved by the bankruptcy court. PBGC has promulgated no regulations applicable to this situation, has issued no relevant opinion letters and, in fact, has refused to recognize the problem once it arose.

The issues raised by PBGC's petition for certiorari do not warrant judicial review at this time. The principal argument for granting certiorari is the alleged threat to the federal premium insurance program caused by the insistence of the Courts below that PBGC adhere to the minimum requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* (West 1982 & Supp. 1989), in making its determination to restore the plans in question. PBGC would thrust upon this Court for review, prematurely in the opinion of the Equity Committee, its claim that its discretion to restore a previously terminated pension plan is practically boundless and that any judicial intervention to enforce minimal standards of fairness is an unwarranted interference with the agency's pursuit of the statutory goals of ERISA.

Facts and Proceedings

On or about July 17, 1986 (the "Petition Date"), LTV Corp. and sixty-six related affiliates, including LTV Steel, filed petitions for reorganization under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. These cases were assigned to the Honorable Burton R. Lifland, Chief Judge of that Court. The cases have been consolidated procedurally and are being jointly administered pursuant to an order of the Bankruptcy Court.

The principal reason given by the Debtors for filing the Chapter 11 petitions was the need to resolve their multi-billion dollar pension liability problem. As of the Petition Date, LTV Steel was the plan sponsor of four single employer, defined benefit pension plans (the "Plans"), as defined by ERISA. LTV Corp. was the plan administrator of the Plans, as defined by ERISA, 29 U.S.C. § 1002.

Almost immediately after LTV filed its Chapter 11 petitions, PBGC became an active and necessary player in the drama. LTV Steel took the position that its bankruptcy filing prevented it from making pension plan payments except by order of the bankruptcy court because such contributions would otherwise constitute an improper payment of prepetition debts. As a result, on August 28, 1986, LTV Steel applied to the Internal Revenue Service ("IRS") for a waiver of its minimum annual pension funding obligations in the amount of $215 million for the four LTV Steel Plans for the plan year ending December 31, 1985. On September 30, 1986, the District Court entered an order, with the consent of LTV, terminating one of the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. The terminated Plan is not at issue in this case.

In November, 1986 the IRS, after consultation with PBGC, denied LTV Steel's funding waiver requests for the three re-

maining Plans for the plan year 1985 in the amount of $205 million, and revoked the previously granted waiver for plan year 1984 in the amount of $175 million.

On December 15, 1986, PBGC staff personnel in the form of a "SEPPAA Trusteeship Working Group" met to determine whether to terminate the three remaining Plans involuntarily because of (1) the denial (in which PBGC had played a role) of funding waivers by the IRS which left the Plans in violation of the minimum funding standards; and (2) the views of Mr. Mike Wells, Associate Director, Insurance Operations Department and senior financial person for PBGC that "*the probability that LTV can survive with the Plans intact is 'de minimis.'*" (emphasis added) (Respondent's App. p. 10a)

PBGC's Working Group met twice more on December 18, 1986 and January 5, 1987, and recommended involuntary termination of the three Plans to the agency's Executive Director, after the Group concluded that "LTV could not afford to maintain the plans," and that a projected and optimistic $300 million cash flow per year and a "cash build up of just over $1 billion by the end of 1988 ***would not be sufficient to finance a plan of reorganization and the ongoing Plans.***" (emphasis added). The group's conclusion was that the termination must occur "now or later." (Respondent's App. p. 10a)

On January 12, 1987, the District Court entered orders terminating the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. As a result of the terminations of the Plans, PBGC became the statutory guarantor and trustee of each Plan, and was vested with complete authority and control over the administration of each Plan. PBGC also became liable for funding the payment of a portion of the non-forfeitable benefits due beneficiaries under the Plans.

The United Steelworkers of America ("USWA" or "Union"), the collective bargaining representative for hourly-paid employees of LTV Steel, strenuously objected to termination of the two plans for hourly employees and to the resulting reduction in benefits paid to its members. The Union unsuccessfully appealed the termination orders and also filed suit in the bankruptcy court on January 16, 1987, seeking to obtain payment of benefits under the Plans on the grounds that the reduction in pension benefits constituted a breach of the existing collective bargaining agreement between the Union and LTV and section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113. The Union also threatened a strike if its demands remained unsatisfied. Fearing that a strike would paralyze the debtors early in their reorganization effort, and prepared to alleviate some of the hardships imposed on active and retired employees, LTV Steel took the steps needed to address the Union demands, including the negotiation of an interim collective bargaining agreement. LTV Steel obtained bankruptcy court approval to make a single hardship payment to retirees affected by the Plan terminations. Additionally, LTV Steel and the Union entered into a modified collective bargaining agreement to remain in effect only until a plan of reorganization for LTV Steel was confirmed (the "Interim Agreement"). The Interim Agreement resolved the Union's lawsuit by granting its members some additional pension benefits. Over the objection of PBGC, a voluntary and active participant in the bankruptcy proceedings, the Interim Agreement was approved by the bankruptcy court on July 30, 1987. The bankruptcy court, the District Court and the Court of Appeals denied PBGC's applications to stay the implementation of the Interim Agreement.

Immediately thereafter, PBGC asserted that the benefit plans provided by the Interim Agreement were nothing more than abusive "follow-on" plans that allowed LTV Steel to offer as high a level of benefits to present and former employees as had been provided by the terminated Plans while shifting a substantial portion of the costs to PBGC. On August 12, 1987, the SEPPAA Trusteeship Working Group, without a formal hearing, issued a recommendation to the Executive Director of PBGC that the three LTV Steel Plans be restored to prevent the so-called abuse of the pension insurance program. This recommendation was based upon the Working Group's conclusions that: (1) LTV Steel had established abusive follow-on plans which provided substantially the same benefits to present and former employees as the terminated Plans and were partially funded by PBGC; (2) the improvement in LTV Steel's financial position in the six months since termination of the three Plans at issue justified restoration; and (3) LTV had demonstrated a willingness to fund its employee retirement Plans.

These conclusions contain obvious substantive and procedural problems for PBGC. First, the finding of improvement in LTV's financial position was a dramatic turn-around from PBGC's conclusion, when the Plans were terminated only six months earlier, that LTV lacked the long-term capacity to fund them. Second, PBGC never acknowledged any responsibility to work within the bankruptcy framework to assist plan beneficiaries while a court-supervised reorganization was in progress and never explained how the Interim Agreement was "abusive" or how PBGC's long-run financial concerns had been dispelled by LTV's sudden, short-term improvement. Before making a decision, the Executive Director consulted with the Board of Directors of PBGC which upheld the authority of the Executive Director to determine when particular plans should be restored.

On September 22, 1987, PBGC issued a notice of restoration, pursuant to ERISA section 4047, ordering the restora-

tion of three of the terminated LTV Steel Plans to their pretermination status. PBGC commenced this lawsuit to enforce its notice of restoration on October 9, 1987, in the United States District Court for the Southern District of New York. LTV then brought an action in the bankruptcy court alleging that restoration violated the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362(a). The District Court granted PBGC's motion to withdraw LTV's action from the bankruptcy court and considered both actions together.

The District Court denied PBGC's motion for summary judgment on June 22, 1988, and by judgment dated September 7, 1988 vacated PBGC's notice of restoration and remanded to PBGC for further proceedings. While the District Court upheld the power of PBGC to restore previously terminated plans, the Court ruled that the agency had acted arbitrarily and capriciously in failing to observe the standards of the APA. The Court, in effect, drew a roadmap for the agency outlining the steps in plan restoration.

Instead of accepting the remand, PBGC appealed to the Second Circuit. On May 12, 1989 the Court found that PBGC exceeded the bounds set by statutory procedures and permissible discretion because (1) PBGC could not restore the LTV Steel Plans solely by claiming that the Interim Agreement with USWA set up abusive follow-on plans; and (2) PBGC could not ignore the minimal procedures mandated by the APA in making the factual findings of improved economic circumstances and in failing to consider the impact of central policies of federal bankruptcy and labor laws applicable to this bankruptcy reorganization in reaching its decision. The Court of Appeals also drew a roadmap outlining the steps in plan restoration for the agency. Fifteen months after the District Court decision, PBGC still refuses to accept the remand and has filed this petition for certiorari.

In all, this petition presents nothing more dramatic than a federal agency that has failed to follow the procedures required of it by the APA, and that has been told by two United States Courts to "go back and do it right." In the face of contrary precedent, and having failed totally to demonstrate any economic harm that will result from the remand, PBGC continues to argue, unpersuasively, that it does not have to abide by fundamental statutory standards.

THIS COURT SHOULD DENY THE WRIT OF CERTIORARI SOUGHT BY PBGC

1. PBGC Has Presented No Evidence Of Compelling Economic Necessity Justifying The Granting Of Certiorari At This Time

PBGC's petition conjures up a misleading sense of urgency surrounding the proceedings. PBGC has presented no evidence to support its assertion that it will suffer calamitous losses if certiorari is denied at this time. Indeed, PBGC has not even made the minimal showing that the Plan assets in large measure will not carry the Plans through the period of remand and permit payment of benefits. Neither has it shown what the real cost to the insurance fund will be if it is temporarily required to fund a portion of LTV Steel Plan liability. The two billion dollar figure PBGC cites in its brief is not the cost of projected PBGC outlays during remand, but instead the present value of PBGC's projected payment stream for the remainder of the lives of participants in the three pension plans, over many decades after a plan of reorganization presumably would have been confirmed. Because PBGC has failed to present any "special and important reasons" as required for certiorari by Supreme Court Rule 17, this Court should deny PBGC's petition.

2. Certiorari Is Not Justified At This Time Because PBGC Failed To Consider All Relevant Factors Before Deciding That Improved Financial Circumstances Justified Restoration Of LTV Steel's Plans

PBGC is not entitled to certiorari at this time because it has failed, and since the District Court decision, indeed refused, to make the administrative findings necessary to support a decision to restore the Plans based upon LTV Steel's changed financial circumstances. 875 F.2d at 1020. The consequence of PBGC's refusal to make the required analysis is that this Court is being asked to grant certiorari solely so that PBGC does not have to do that which it is statutorily required to do.

The Equity Committee does not contest PBGC's power to restore a previously-terminated pension plan upon a showing of changed financial circumstances under ERISA section 4047, 29 U.S.C. § 1347. However, PBGC cannot seriously dispute that it is an administrative agency subject to the provisions of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (West 1982 & Supp. 1989), and that it is not free to act on a whim. *See, e.g., Belland v. Pension Ben. Guar. Corp.*, 726 F.2d 839, 844 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984); *A-T-O, Inc. v. Pension Ben. Guar. Corp.*, 634 F.2d 1013, 1019 n.10 (6th Cir. 1980); *Pension Ben. Guar. Corp. v. Hathaway Machinery Co.*, 566 F. Supp. 1223, 1224 (D. Mass. 1983). The Equity Committee position below was essentially accepted by both courts, each of which ruled that the agency could not restore the terminated Plans without following procedures mandated by the APA, and without giving due regard to the applicable provisions of federal bankruptcy and labor law as well as ERISA.

Decisions by PBGC, including decisions to restore plans pursuant to 29 U.S.C. § 1347, are subject to judicial review under

the arbitrary and capricious standard found in 5 U.S.C. § 706(2)(a), *Belland*, 726 F.2d at 844. In applying this standard, a court must decide whether PBGC's decision was based upon consideration of all the relevant factors and whether PBGC followed necessary procedural requirements. *See, e.g., Marsh v. Oregon Natural Resources Council*, ___ U.S. ___, ___, 109 S. Ct. 1851, 1861 (1989) ("the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment'") (citation omitted); *Bowman Transp. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) ("The agency must articulate a 'rational connection between the facts found and the choice made'"); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The Court of Appeals adopted the position of the Equity Committee and correctly recognized that PBGC had failed, indeed refused, to consider many centrally relevant factors prior to reaching its hasty decision to restore the LTV plans. Most significantly, the Court of Appeals rejected PBGC's claim that it need not consider the policies of federal labor law and federal bankruptcy law implicated by its actions. 875 F.2d at 1016. Given that the legislative history of ERISA section 4047 demonstrates conclusively that changes in financial circumstances were the central factor for determining when restoration should be ordered, and given PBGC's ongoing voluntary participation in the bankruptcy proceedings, it is difficult to see how consideration of LTV's bankruptcy filing and the policy concerns of bankruptcy law could be ignored by the agency.

In rejecting PBGC's finding that LTV Steel's changed financial circumstances justified restoration of the Plans, the Court of Appeals identified several significant deficiencies in PBGC's administrative record including: (1) a summary financial analysis

that reviewed LTV's income trend only for a five month period; (2) PBGC's assumption that LTV would be able to obtain funding waivers from the IRS for the years 1984 through 1986 and after, despite the fact that the IRS had *denied* LTV's request for a waiver for 1985 and had revoked a waiver for 1984; (3) PBGC's assumption that pension savings based upon job reductions in the interim agreement would be preserved in future labor agreements when the Union would be less likely to grant such concessions; and (4) PBGC's complete failure to assess the impact of LTV's status as a Chapter 11 debtor on its financial condition. The Court of Appeals criticized PBGC for focusing on LTV's short-term economic conditions, without considering the long-term implications of plan restoration, including the likelihood of retermination. 875 F.2d at 1020.[1]

Procedurally, the Court of Appeals identified three different failures by PBGC, any one of which, by itself, rendered PBGC's decision arbitrary and capricious: (1) PBGC's failure to apprise LTV Steel of the material on which it based a decision; (2) PBGC's failure to give LTV an opportunity to offer contrary evidence; and (3) PBGC's failure to proceed in accordance with ascertainable standards. 875 F.2d at 1021 (citing *Bowman Transp. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 288 n.4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that [it] may rebut it").)

[1]PBGC contends, in the alternative, that the respondents sought, and the Court of Appeals awarded, some sort of measure of review in excess of that provided by the APA. This claim is incorrect. PBGC's reliance on this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is inappropriate in this regard because: (1) this Court was formulating standards of review applicable solely to rulemaking under 5 U.S.C. § 553; and (2) this Court did not address an agency's failure to prepare an administrative record sufficient to satisfy the arbitrary and capricious standard.

That the Court of Appeals was correct in concluding that PBGC acted in an arbitrary and capricious manner can be seen from the fact that PBGC did not even consider any alternatives to full and immediate restoration of the LTV Steel Plans, despite the fact that ERISA section 4047 expressly provides for "such action as may be necessary . . . including, but not limited to, the transfer to the employer . . . of control of part or all of the remaining assets and liabilities of the plan." PBGC's actions in this case in examining LTV's income trend for a mere five months also are inconsistent with earlier PBGC opinion letters addressing proposals for plan restoration. PBGC has consistently required the plan sponsor to demonstrate the long-term capacity to fund the plan and avoid the necessity for retermination. *See, e.g.*, PBGC Opinion Letter 83-5 (February 2, 1983) (LEXIS, Labor library, PBGC file) ("The Company agrees that it will not . . . terminate the Plan for at least five years after the date of the restoration of the Plan"); PBGC Opinion Letter 82-11 (April 1, 1982) (LEXIS, Labor library, PBGC file); PBGC Opinion Letter 77-132 (February 18, 1977) (LEXIS, Labor library, PBGC file). *See also I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("[a]n agency interpretation . . . which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view").

Given the numerous centrally relevant issues on which PBGC failed — and has consistently refused — to develop an administrative record before ordering restoration of the three LTV Steel Plans on the basis of improved economic circumstances, no purpose would be served by granting certiorari at this time. The Court of Appeals requires PBGC to do nothing more than carry out its statutory responsibilities, including the preparation of a complete administrative record, prior to rendering a decision neither court below denies it the general authority to make. Given the absence of any impen-

ding fiscal crisis at PBGC, a grant of certiorari would serve only to allow the PBGC to escape its statutory responsibilities once again.

3. Certiorari Is Not Appropriate Given PBGC's Failure To Demonstrate That LTV Steel's Actions Amount To Follow-On Plan Abuse

Certiorari is inappropriate at this time, given PBGC's failure to demonstrate that LTV Steel's actions constitute an abusive follow-on plan. The Court of Appeals concluded, "PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the [Interim Agreement was] merely a continuation of the old Plans." 875 F.2d at 1017. This failure, indeed refusal, by PBGC ensures that any review of this question by this Court will be conducted without the benefit of the factual record necessary to support the central, novel contention PBGC makes in this case, namely whether a reorganizing debtor's interim pension plan, established after termination of preexisting plans, pursuant to a collective bargaining agreement and bankruptcy court approval, constitutes an "abusive follow-on plan." Certiorari at this time would allow PBGC the luxury of making this claim without performing the analysis it is required by law to perform. This Court should not permit PBGC to avoid its statutory responsibility.

4. Even If, *Arguendo*, The Court Of Appeals Erred In Holding That LTV Steel's Establishment Of An Interim Benefit Plan Did Not Constitute Grounds For Restoration Of The Original Plans, Certiorari Would Be Inappropriate

Assuming, *arguendo*, that the Court of Appeals erred in concluding that the language of ERISA section 4047, 29 U.S.C. § 1347, does not permit PBGC to base a restoration decision

on the establishment of follow-on Plan abuse, which it did not do, nevertheless, certiorari should be denied.

Given PBGC's refusal to develop a proper administrative record in support of either one of the claimed bases for restoration, and PBGC's complete failure to demonstrate that any financial calamity would befall the agency should the Plans remain terminated during the remand period, the Court of Appeals' ruling that LTV's establishment of an interim plan does not constitute grounds for restoration provides no basis for certiorari at this time. Even if the Court of Appeals is wrong, review of this question can await completion of the factual record, by which time further review of this issue might well be unnecessary. Perhaps more significantly, this ruling by the Court of Appeals seems well-founded.

Congress has not directly spoken to the question of whether the establishment of a follow-on plan is a basis for restoration. 875 F.2d at 1017. Under section 4047, restoration of a terminated plan:

> . . . is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347.

However, Congress has provided guidance in the legislative history, and that legislative history is consistent with the Court of Appeals' ruling and contrary to PBGC's asserted justification. In speaking to abusive follow-on plans, Congress was concerned that solvent, healthy employers might promise to

increase plan benefits while leaving PBGC to finance such benefit increases for an indefinite period. To the contrary, in situations such as the present one, Congress "[a]cknowledg[ed] that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance. . . ." *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 367 n.12 (1980) (quoting *Nachman Corp. v. Pension Ben. Guar. Corp.*, 592 F.2d 947, 963 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980)). The Court of Appeals recognized that Congress acknowledged that the situation in this case, in which an interim plan is approved by the bankruptcy court solely to further the reorganization effort, is not an abusive follow-on plan. 875 F.2d at 1016-17. Indeed under the very PBGC precedent relied upon to restore the Plans, the so-called follow-on plans of LTV were *not* abusive.

Furthermore, Congress never intended that restoration be ordered as a response to creation of follow-on plans. 875 F.2d at 1017. Instead, Congress intended for section 4047 restoration to be ordered only when a company's financial circumstances were found to have improved, essentially reversing the statutory grounds for termination: the prospect of an unreasonable long-run loss to PBGC. *Id.* (citing H.R. Rep. No. 1280, 93rd Cong., 2nd Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 5038, 5158). Congress continued this policy choice when it enacted the SEPPAA amendments to ERISA, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986), and once again did not consider whether a "follow-on" plan constituted grounds for restoration. *Id.* (citing H.R. Rep. No. 241, 99th Cong., 2nd Sess., pt 2, at 51-55, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 709-713). Most significantly, the legislative history of the most recent ERISA amendments demonstrates that Congress expressly considered a proposal to make the establishment of follow-on plans

a basis for restoration and *rejected* it. *Id.* (citing H.R. Rep. No. 100-495, 100th Cong., 1st Sess. 874-85, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1625 to 1631).

PBGC's reliance on its two opinion letters condemning follow-on plan abuse does not support its petition. Both PBGC Opinion Letter 81-11 (May 11, 1981) (LEXIS, Labor library, PBGC file), and PBGC Opinion Letter 86-27 (December 17, 1986) (LEXIS, Labor library, PBGC file), deal with solvent employers attempting to use PBGC to subsidize the cost of ongoing plans for employees of an ongoing business. Both opinions claim, without any significant authority, that Congress intended for section 4047 to be used to remedy follow-on plan abuse. Even if that premise were correct, neither opinion even suggests that the establishment of an interim plan, as an exigency of survival in reorganization proceedings, pursuant to a collective bargaining agreement and under bankruptcy court supervision, by a financially troubled employer and under circumstances where PBGC has determined that continuation of the terminated plan posed a long-run threat to PBGC, is a proper ground for restoration.

After examining the statutory language and legislative history of section 4047 and the prior PBGC letters, the Second Circuit looked to the policies of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (West 1973 & Supp. 1989), favoring the enforcement of collective bargaining agreements and to the right of employees to receive benefits beyond those guaranteed by ERISA. The Court of Appeals reached the unassailable conclusion that benefits not guaranteed by ERISA but provided by the interim agreement did not run afoul of any statutory provisions of ERISA. 875 F.2d at 1017 (citing *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237-39 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982)).

Thus, the Second Circuit did not err in affirming the remand order and holding that PBGC's reading of ERISA section 4047 was unreasonable. Neither the statutory language and legislative history nor the other applicable federal policies embodied in statutory and decisional law support the conclusion that restoration of the Plans in question was appropriate under section 4047. Given PBGC's total failure, indeed refusal, to develop a factual basis for review on either theory it is advancing, the Court of Appeals' ruling provides no basis for certiorari.

5. Remand To PBGC For Further Proceedings Might Obviate The Need For Review By This Court

Before deciding whether or not to grant PBGC's petition for certiorari, this Court should consider the nature of the relief ordered by the Courts below and the possibility that such relief might eliminate the need for further review by this Court. The District Court vacated PBGC's notice of restoration because it could not be upheld on the administrative record and remanded the matter to PBGC. The Court of Appeals affirmed. On remand, PBGC might develop facts in justifying its decision to restore the three LTV Steel Plans on the basis of changed financial circumstances. Such a result would eliminate the need for PBGC to seek review by this Court. On the other hand, should the facts fail to demonstrate that changed economic circumstances support restoration of the LTV Steel Plans on remand, both the issues of the proper statutory standard for plan restoration and the adequacy of the agency's record would be appealable. Accordingly, interests of judicial economy and efficiency favor denial of PBGC's petition for certiorari at this time.

6. The Court Of Appeals Acted Correctly In Reviewing The Actions Taken By PBGC

In petitioning this Court for certiorari, PBGC argues that the Court of Appeals overstepped the bounds of proper judicial review of PBGC's construction of ERISA section 4047, 29 U.S.C. § 1347. This argument is incorrect.

When reviewing the construction of a federal statute by the administrative agency charged with responsibility for its implementation, this Court has directed that a multi-faceted analysis be conducted:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . Sometimes, the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984). Deference will be given to administrative interpretation, where "this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," *Id.* at 845. However, this Court has cautioned that:

> [D]eference is not to be a device that emasculates the significance of judicial review. Judicial deference to an agency's interpretation of a statute "only sets 'the framework for judicial analysis; it does not displace it'". . . . A reviewing court "must reject

> administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."

Securities Industry Ass'n v. Board of Governors of the Federal Reserve System, 468 U.S. 137, 142-43 (1984) (citations omitted). *See, e.g., Bowen v. Georgetown University Hospital*, ____ U.S. ____, ____, 109 S. Ct. 468, 474 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate"); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495,____, 108 S. Ct. 805, 817 (1988), holding the Interior Secretary's construction of the Flood Control Act of 1944 not "reasonable" ("[T]he Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law.").

In this case, the Court of Appeals concluded that PBGC's construction of ERISA section 4047 was unreasonable and hence not entitled to judicial deference because (1) the creation of an interim benefit plan pursuant to a collective bargaining agreement and subject to approval by the bankruptcy court is not adequate grounds for restoration; and (2) PBGC failed to follow the mandate of the APA and failed to consider all reasonable factors before deciding to restore the LTV Steel Plans pursuant to section 4047. The Court of Appeals' careful review of PBGC's actions in this case demonstrates that certiorari is unnecessary at this time.

CONCLUSION

For the foregoing reasons, the Equity Committee respectfully urges this Court to deny PBGC's petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: October 12, 1989.

Respectfully submitted,

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PENSION BENEFIT GUARANTY CORPORATION

82-11

APRIL 1, 1982

REFERENCE:
4047 Restoration of Plans

OPINION:

This is in response to several letters to the Pension Benefit Guaranty Corporation (the "PBGC"), pertaining to the restoration of the referenced pension plan (the "Plan") pursuant to Section 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1347. We have concluded that restoration of the Plan under that section may be proper, and we will provide appropriate assistance to the Plan's administrator in its efforts to restore the Plan.

The relevant facts, as they have been represented to us or as we have otherwise become aware of them, are as follows. The * * * Company adopted the Plan for its employees in 1951. The Plan was a tax-qualified, defined benefit, single-employer pension plan that, on enactment of ERISA in 1974, became subject to the termination insurance provisions of Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.* On May 10, 1979, at which time the Plan was maintained by * * * Corporation (the "Company"), the PBGC received from the Plan's administrator a Notice of Intent to Terminate the Plan. On September 17, 1981, counsel for the Plan's administrator wrote to the PBGC requesting that the PBGC permit the Plan to be restored, pursuant to Section 4047 of ERISA, 29 U.S.C. § 1347.

We have determined that, if the "Conditions" listed below are fulfilled, the Plan may be restored to its earlier status. On receipt of appropriate assurance that those Conditions will

be fulfilled, we shall accordingly permit the Plan's administrator to withdraw the Notice of Intent to Terminate the Plan.

CONDITIONS

1. The Company and every trade or business under common control with the Company, within the meaning of Section 4001(b) of ERISA, 29 U.S.C. § 1301(b) (the "controlled group"), shall agree that, in the event of a subsequent termination of the Plan or of any successor plan, occurring less than ten years after the date of the Plan administrator's withdrawal of the Notice of Intent to Terminate the Plan, they will pay to the PBGC the excess, if any, of

(a) the current value of the Plan's benefits guaranteed under Title IV of ERISA as of the date of that termination over

(b) the current value of the Plan's assets allocable to such benefits on the date of that termination.

Thus, the controlled group shall be liable to the PBGC for the amount determined under subsection 4062(b) of ERISA, 29 U.S.C. § 1362(b), without regard to the limitation to 30% of the controlled group's net worth provided by paragraph (2) thereof.

2. If the Plan or any successor plan terminates less than five years after the date of the Plan administrator's withdrawal of the Notice of Intent to Terminate the Plan, the Company and the controlled group will pay to the PBGC the greater of

(a) the liability to the PBGC under § 4062(b) of ERISA, 29 U.S.C. § 1362(b), that would have been due the PBGC thereunder for the Plan's termination effective May 20, 1979, computed without regard to the 30% limitation of paragraph 4062(b)(2), 29 U.S.C. § 1362(b)(2), or

(b) the liability determined under Condition 1, *supra*.

3. The Plan shall be amended to provide that, in the event of its termination, any assets not necessary to provide those benefits described in Section 4044(a)(1-6), 29 U.S.C. § 1344(a)(1-6), *i.e.*, any "residual assets" as described in Section 4044(d) of ERISA, 29 U.S.C. § 1344(d), shall be distributed entirely among Plan participants and beneficiaries in accordance with applicable PBGC regulations (currently Proposed 29 C.F.R. §§ 2618.31-32). Such amendment shall not be subject to modification that would permit any payment of residual Plan assets to any person other than a Plan participant or beneficiary, or a successor plan that fulfills all of the Conditions listed herein.

4. No amendment to the Plan or to any successor plan may be adopted which restricts participation rights or accrual of Plan benefits, limits accumulation of service for vesting purposes, or reduces any benefit entitlements under the Plan or the successor plan.

5. All past, present and future service to the Company shall be considered service for the purposes of benefit accrual, vesting, and participation under the restored Plan or any successor plan.

6. Any Plan participant or beneficiary in pay status shall receive the full benefit to which he (she) is entitled under the terms of the Plan or of any successor plan.

7. The Company shall make all contributions to the Plan required under the Internal Revenue Code or under ERISA, as though the Notice of Intent to Terminate the plan had never been submitted. Such contributions shall include, in particular, any appropriate payments due as the result of past funding waivers, and interest thereon.

The above Conditions shall become effective upon the PBGC's written grant of a request by the Plan administrator

for permission to withdraw the previously submitted Notice of Intent to Terminate the Plan. At that time, the parties to the litigation over the Plan's status will take appropriate steps to terminate that litigation.

I trust these suggestions will prove satisfactory. Please feel free, if you have any questions, to contact * * * of my staff at the address above or at (202) 254-3010.

Sincerely
Robert E. Nagle
Executive Director

PENSION BENEFIT GUARANTY CORPORATION

83-5

FEBRUARY 2, 1983

REFERENCE:
4047 Restoration of Plans
4062 Liability of Employer in Single Employer Plans

OPINION:

This responds to your letter in which you, on behalf of * * * Corp. (the "Company"), indicate an interest in restoring the * * * Inc. Retirement Income Plan (the "Plan"). The Plan administrator filed a Notice of Intent to Terminate the Plan on * * *.

In view of the facts and circumstances of this case, including the short period of time between the filing of the Notice and the request for restoration, the PBGC would permit restoration of the Plan if:

1. The Company agrees to reimburse the PBGC for all expenses the PBGC has incurred as a result of the filing of the Notice, including all expenses incurred in determining, filing and litigating bankruptcy claims pertaining to the Plan.

2. The Company agrees that it will not, without PBGC consent, terminate the Plan for at least five years after the date of the restoration of the Plan.

3. The Company agrees that, if the Plan terminates for any reason whatsoever within five years of the date of the restoration of the Plan, the Company will be liable to the PBGC for * * * less the amount of any employer contributions made to the Plan subsequent to the date of the restoration. This liability shall not be limited by the Company's net worth and shall be in addition to the Company's liability: (a) to the PBGC for the

amount of liability, as of the date the Plan terminates, under 29 U.S.C. § 1362; and (b) to the Plan for employer contributions required by statute or by contract. The amount paid to the PBGC under this paragraph shall be credited as an asset of the Plan in determining the amount due under 29 U.S.C. § 1362.

4. The Company agrees that it will continue to fund the Plan in accordance with any contractual obligations to contribute to the Plan and in accordance with the minimum funding standards contained in Section 412 of the Internal Revenue Code (the "Code"), 26 U.S.C. § 412 and in Section 302 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1082.

We understand that the Company may amend the Plan to cease benefit accruals but that accruals for purposes of vesting will continue. Of course, any such amendment must comply with the requirements of ERISA and the Code.

Sincerely
Henry Rose
General Counsel

PENSION BENEFIT GUARANTY CORPORATION

77-132

FEBRUARY 18, 1977

REFERENCE:
4047 Restoration of Plans

OPINION:

This is in response to your letter requesting that the Pension Benefit Guaranty Corporation (the "PBGC") consider a proposed alternative to termination of * * * (the "Plan"), which would involve a restoration of the Plan on a curtailed basis. This also will serve to acknowledge receipt of the Notice of Intent to Terminate the Plan (the "Termination Notice"), which was received by the PBGC with your letter on * * *, proposing a termination date of December 31 1976.[1]

As we understand the pertinent facts, the Plan was adopted, effective * * *, by * * * (the 'Company") and its affiliate, * * *.[2] The Plan has insufficient assets to pay all guaranteed benefits under the Plan. Although the Company, as plan administrator, has submitted a Termination Notice for the Plan, the Company expressed a willingness to continue the Plan,

[1]We should note that Section 4041(a) of the Employee Retirement Income Security Act of 1974 (the "Act") requires that a Notice of Intent to Terminate be filed with the PBGC at least 10 days before the proposed date of termination. A Notice of Intent to Terminate is deemed to have been filed on the date on which it is received by the PBGC. 29 C.F.R. § 2604.5 (1976).

[2]We will assume, for the purposes of this letter, that the Plan actually is one pension plan. That is, we will assume that benefits under the Plan are not payable with respect to each participant only to the extent of the Plan assets attributable to the employer who employed that participant. Rather, all Plan assets are available to pay all benefits under the Plan. But see, Plan, Article 13.1.

subject to the adoption of a Plan amendment, effective as of January 1, 1976, which would provide, as follows:

1) Benefit accruals under the Plan will cease as of January 1, 1976;

2) No employee will be eligible to become a participant in the Plan after December 31, 1975;

3) The Company will contribute to the Plan in accordance with the requirements of Section 412 of the Internal Revenue Code;

4) Each bargaining unit member will be afforded the opportunity to elect to receive a lump-sum payment of his or her accrued benefit under the Plan as of December 31, 1975, which will be considered to be 100% vested to the extent of Plan assets allocable to such benefit as of December 31, 1976; each bargaining unit member who so elects would be required to execute a form under which that participant waives any claim he or she might have to "future benefits" under the Plan or Title IV of the Act;

5) Participants who do not receive a lump-sum payment, pursuant to paragraph 4, will continue to receive credited service in accordance with the "elapsed time system."

The proposed amendment also will make other changes in the Plan so that the Plan will comply with the Act.

You asked whether the PBGC will permit the Plan to be restored on a curtailed basis in accordance with the abovementioned proposed Plan amendment should the Company request that it be allowed to withdraw the Termination Notice, and, if not, what adjustments would have to be made for the PBGC to permit a withdrawal. The PBGC will permit the Plan to be restored if certain adjustments are made in the proposal. The proposed Plan amendment should be revised so that no

employee will be eligible to become a participant in the Plan after December 31, 1976, benefit accruals will cease after December 31, 1976, and paragraph 4 is deleted, *i.e.*, the Plan is not amended so as to afford bargaining unit members the opportunity to elect to receive a lump-sum payment of any amount (the "Revised Proposed Plan Amendment"). The adoption of the Revised Proposed Plan Amendment will not result in the imposition of employer liability under the Act.

Some of these changes in the proposal are necessary because of the PBGC's policy not to agree to a withdrawal of a termination notice where it results in prejudice to the PBGC or to participants or others. *See generally*, PBGC, Guidelines on Voluntary Termination, Publication No. 503 (January, 1977). The PBGC will not exercise its discretionary authority under Section 4047 of the Act and permit the Termination Notice to be withdrawn in a situation such as this where an employer seeks retroactively to cease benefit accruals as of a date one year or more prior to the termination date since it would appear that the PBGC's action under such circumstances would not be in the best interests of Plan participants. It also is not clear that Section 4047 authorizes the PBGC to take such action. The other changes in the proposal are necessary because the PBGC will not permit a restoration where the employer intends to offer participants the opportunity to elect to receive a lump-sum payment of an amount less than their guaranteed benefit under Title IV.

Should you wish to pursue this matter any further, please contact * * * of my staff at * * * or at the above address.

Sincerely
Henry Rose
General Counsel

Excerpt from:

IOD/LD SEPPAA Trusteeship Working Group Minutes Of Monday, December 15, 1986.

* * *

7. Mike Wells, Associate Director, IOD, presented an overview of LTV's financial situation with a concentration on its Steel Divisions. Mr. Wells represented that the probability that LTV can survive with the Plans intact is "de minimis."

* * *

Excerpt from:

IOD/LD SEPPAA Trusteeship Working Group Minutes Of Thursday, December 18, 1986

2. The group reviewed the status of the action items established at the previous meeting: . . .

> b. Robert Klein presented an analysis of LTV's ability to make ongoing contributions to the Plans. His conclusion was that LTV could not afford to maintain the Plans under their own optimistic projections. Bob felt that LTV's assumptions concerning the steel industry are reasonable; however, their assumptions concerning LTV's projections are optimistic. Bob submitted a memorandum to the group indicating that a projected cash flow of $300 million per year together with a planned cash build-up of just over $1 billion by the end of 1988 would not be sufficient to finance a plan of reorganization and the ongoing Plans. The group thus concluded that termination would occur; the relevant question was whether it would be now or later.

(5)

No. 89-390

In the Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION, PETITIONER

v.

LTV CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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24 pp

QUESTION PRESENTED

Section 4047 of the Employee Retirement Income Security Act of 1947 (ERISA), 29 U.S.C. 1347 (1982 & Supp. V 1987), authorizes the Pension Benefit Guaranty Corporation (PBGC) to "restore" a terminated pension plan to its pre-termination status, thus transferring the assets and liabilities of the plan back to the sponsoring employer, "in any such case in which the corporation determines such action to be appropriate and consistent with its duties." In this case, the PBGC restored pension plans sponsored by LTV Steel Company in part because LTV Steel, subsequent to the termination, adopted "follow-on" plans to provide benefits not covered by the termination insurance program. The PBGC determined that LTV Steel had abused the termination insurance program by shifting its liabilities to the PBGC while, in effect, continuing to operate the plans. The Second Circuit, which concluded that the PBGC had "focused inordinately on ERISA" (Pet. App. 17a) and had failed to take into account policies underlying bankruptcy and other labor laws, held, inter alia, that the PBGC erred in basing its restoration decision on LTV Steel's adoption of follow-on plans.

The United States will address the following question:

May the PBGC, in deciding whether to restore a terminated plan, take into consideration the sponsoring employer's adoption of an abusive follow-on plan?

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INTEREST OF THE UNITED STATES

This case involves the termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly owned government corporation that has independent litigating authority (29 U.S.C. 1302(b)(1)), is primarily responsible for operating the termination insurance program. But the Department of Labor and the Treasury Department also have substantial interests in the operation of the program. Under 29 U.S.C. 1104(a)(1)(D) and 1132(a)(2), the Secretary of Labor may bring suit to enforce the terms of employee benefit plans. See

also 29 U.S.C. 1132(a)(5). Under 29 U.S.C. 1132(b), the Secretary of the Treasury and the Secretary of Labor have joint responsibility with respect to delinquent contribution actions against employers that have not fulfilled the minimum funding requirements established by ERISA. And under 26 U.S.C. 4971, the Secretary of the Treasury is responsible for imposing excise taxes on employers that do not fund their pension plans in accordance with ERISA's requirements.

Moreover, the court of appeals in this case held that the broad grant of authority to the PBGC in Section 4047 of ERISA—to restore a terminated pension plan to its pre-termination status and thus to transfer the assets and liabilities of the plan back to the sponsoring employer—is limited by the examples provided in the legislative history relating to the provision. Specifically, the court concluded that because the congressional reports identified improvements in financial condition as a ground for restoration, the PBGC erred in basing its restoration decision on other reasons. Pet. App. 17a-18a. All federal agencies have a strong interest in correcting this erroneous approach to statutory construction—an approach that would significantly reduce agencies' powers under statutory grants of authority.

In addition, the court of appeals held that, since the plan sponsor was seeking to reorganize, the PBGC should have tempered its efforts to protect the termination insurance fund in light of the policies underlying the Bankruptcy Code. That holding is of particular concern to the Federal Deposit Insurance Corporation, which frequently seeks to collect the assets of failed banks for the benefit of the federal deposit insurance fund.

STATEMENT

1. This case arises from the termination and subsequent restoration of three underfunded pension plans maintained by respondent LTV Steel Company. Defined benefit pension plans—the type involved here—are insured by petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation established by Title IV of ERISA. See 29 U.S.C. 1302.[1] Although Title I of ERISA requires employers to make regular contributions to defined benefit plans, a plan may become underfunded even if the employer is fulfilling its minimum funding obligations. For example, if pension benefits are increased as a result of collective bargaining, it might take some time for the plan's trust fund to provide for the increase in obligations. Plans may also become underfunded when an employer obtains a waiver from the Internal Revenue Service allowing it to amortize payments over a period of years rather than pay them immediately. See 26 U.S.C. 412(d). And, of course, plans may become underfunded when the amounts paid as benefits exceed the actuarial predictions, as can happen when financial difficulties cause the layoff of large numbers of employees who are eligible for pension benefits.

[1] Under defined benefit plans, retirees receive a fixed amount per month based on factors such as final salary and years of service. Such plans differ from defined contribution plans, under which employers typically contribute a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. See 29 U.S.C. 1002(34) and (35). Insurance is not needed for defined contribution plans, since employees simply receive the money in their individual accounts. Insurance is needed for defined benefit plans, however, to ensure that funds are available to pay promised pensions.

See PBGC, *Promises at Risk* 26-27 (1987), *reprinted in PBGC Proposal to Initiate a Variable Rate Premium System: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 34-35 (1987); Congressional Budget Office, *Federal Insurance of Private Pension Benefits* 12-15 (Oct. 1987),

Under ERISA's "standard termination" procedure (29 U.S.C. 1341(b) (1982 & Supp. V 1987)), an employer may terminate a plan if the plan has sufficient assets to cover its liabilities.[2] If, as here, a plan is underfunded, an employer may seek a "distress termination" (29 U.S.C. 1341(c) (1982 & Supp. V 1987)), normally from a bankruptcy court. Such a "voluntary" distress termination is allowed if "the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, [the employer] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. 1341(c)(2)(B)(ii)(IV). Thus, a reorganizing company may terminate an underfunded plan only when the alternative is liquidation.

An underfunded plan may also be terminated by the PBGC. Under 29 U.S.C. 1342(a) (1982 & Supp. V 1987), the PBGC may terminate a plan if, for example, it determines that the plan is seriously underfunded or that the possible long-run risk to the PBGC "may reasonably be expected to increase unreasonably if the plan is not terminated." If the PBGC's decision to terminate is contested, district court approval is required. 29 U.S.C. 1342(c).

[2] Special rules apply to multi-employer pension plans. See 29 U.S.C. 1381 *et seq.* The plans at issue here are single-employer plans.

As a result of a termination, the PBGC becomes responsible for some, but not all, of the benefits due under the plan. The PBGC may not pay any beneficiary benefits of more than $750 per month in 1974 dollars—about $2,000 today (see *Promises at Risk, supra*, at 17)—even if an employee is entitled to greater benefits under the terms of a plan. 29 U.S.C. 1322(b)(3)(B). In addition, benefit increases resulting from plan amendments adopted within five years of the termination are not paid in full, and employees do not continue to accrue benefits under a plan once it is terminated. *Promises at Risk, supra*, at 17. These limitations operate as a form of coinsurance, aligning the interests of employees with the PBGC and against termination. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989). The employer is not relieved of liability once it terminates a plan, since the PBGC may seek to recover from the employer (including members of its "controlled group" (see 29 U.S.C. 1301(a)(14)) pursuant to 29 U.S.C. 1362. However, the PBGC normally must stand in line with other creditors in a reorganization proceeding, and it has in the past averaged recovery of only eight cents on the dollar. *Promises at Risk, supra*, at 28.

Plans that have been terminated may be "restored" pursuant to Section 4047 of ERISA, 29 U.S.C. 1347 (1982 & Supp. V 1987). Section 4047 provides that, "[i]n the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status." The provision fur-

ther states that the PBGC may "transfer to the employer * * * all of the remaining assets and liabilities of the plan." Thus, as a result of the restoration of a plan, the employer, rather than the PBGC, becomes responsible for the payment of benefits, and employees are entitled to all benefits due under the plan, not just the benefits insured by the PBGC.[3]

The PBGC has consistently made clear that it will restore a terminated plan if the employer creates an abusive "follow-on" plan. In three opinion letters, it reiterated that "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. Accordingly, if an employer adopts a new plan that, "together with the guaranteed benefits paid by the PBGC under the terminated plan, provide for the payment of, accrual of, or eligibility for benefits that are substantially the same as those provided under the terminated plan" (R. 194), the PBGC views the plan as an attempt to shift liability to the termination insurance program while continuing to operate the plan.[4] In the PBGC's view, the

[3] Judicial approval is not required for a restoration decision to take effect, even though approval is usually necessary before an underfunded plan is terminated. The probable reason for the difference, as the district court noted, is that participants "may immediately experience cutbacks in their benefit payments" as the result of a termination, whereas "either no change or an increase in benefit payments" follows from restoration. Pet. App. 89a.

[4] Whether a new plan, together with the PBGC's payments, provides "substantially the same" benefits must be decided on a case-by-case basis. Some cases are easy, however: in one of the cases in which the PBGC opined that a new plan was impermissible, the new plan expressly stated that it would provide 95 percent of the difference between the benefits

termination insurance program should provide benefits only when plans have really been terminated.

2. The LTV Corporation filed a reorganization petition in 1986. At that time, one of its subsidiaries, LTV Steel, operated three defined benefit pension plans that were underfunded by approximately \$2.3 billion, including some \$2.1 billion in insured benefits. R. 8. LTV "readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. LTV Steel could not terminate the plans under Section 1341, however, because its collective bargaining agreement prohibited termination. 29 U.S.C. 1341(a)(3). But LTV convinced the PBGC to terminate the plans pursuant to Section 1342 by informing the PBGC that it did not intend to make any further contributions to the already underfunded plans. Pet. App. 41a. Since LTV Steel was not contributing to the plans, and since employees would continue to accrue benefits until the plans were terminated, delaying termination would have substantially increased the PBGC's

promised under the terminated plan and the benefits paid by the PBGC. Pet. App. 176a. More generally, the PBGC "views a set of arrangements as substantially the same if it grants credit for purposes of benefit accrual, or for eligibility for certain types of benefits, for service rendered under the terminated plan or if it provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC because of the limitations set forth in Title IV of ERISA." R. 194-195. Thus, a new plan is considered to be an abusive follow-on plan if it is tailored to make up for the benefits lost as a result of termination. The PBGC would not consider it abusive if, for example, an employer created new defined contribution plans that did not differentiate among participants based upon their past service.

potential liability. Moreover, LTV Steel had forecast that it might shut down some of its plants, and its collective bargaining agreement called for generous "shutdown benefits." [5] The PBGC would not be liable for the additional benefits if a shutdown occurred after termination of the plans, since it only pays benefits that have vested on the date of termination. The PBGC sought approval from the district court to terminate the plans and, with LTV's consent, the court approved the termination, making the PBGC the trustee of the plans. *Id.* at 42a.

The United Steelworkers of America (the Union), which had previously struck Wheeling-Pittsburgh Steel when it terminated its pension plans, threatened to strike unless its members received all the benefits due under the plans rather than the reduced benefits that would be paid by the PBGC. Pet. App. 43a. In June 1987, LTV Steel and the Union signed an agreement "which replaced most of the lost (i.e., non-guaranteed) benefits to retirees and created new benefit programs for active workers." *Id.* at 44a. The program, including a similar program for salaried employees, would cost LTV Steel about $90 million annually. *Id.* at 47a.

The PBGC had previously advised LTV and the Union that it viewed the agreement as an abusive follow-on plan, and the PBGC's Executive Director testified to that effect in the bankruptcy court, but the bankruptcy court approved the agreement over the PBGC's objection in July 1987. Pet. App. 45a. The court noted that its action did not "preclude[] the PBGC from pursuing [other] options." R. 623. After meeting with LTV officials and offering to consider any information LTV wanted to provide, the PBGC concluded that LTV Steel's new plans were abusive. In reaching that conclusion, the PBGC noted, among other things, that "[o]ne component of the Follow-On Agreements, the Individual Account Trust ('IAT'), would, by its express terms, replace a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination. The IAT would provide up to 100 per cent of the difference and no less tha[n] 90 per cent of the amount not provided by PBGC". R. 224. The PBGC also concluded that LTV Steel could afford to fund the terminated plans if they were restored.[6] In September 1987, the PBGC restored the three plans pursuant to Section 4047. Pet. App. 49a-50a.

[5] LTV Steel had promised its employees that, in the event of a shutdown, they would immediately become eligible for pension benefits with no reduction to reflect that the benefits commenced prior to normal retirement age.

3. LTV challenged the restoration decision, and the PBGC brought a federal court action to compel LTV Steel to comply with the decision. Pet. App. 51a-52a. The district court held the restoration decision unlawful. Although Section 4047 "contains little in the way of restrictive language" (Pet. App. 85a), the court held that the PBGC erred in considering the follow-on plans because "[t]he legislative history accompanying the enactment of section 4047 reveals that Congress expressly identified only improvements in the financial condition of the plan and its sponsor as possible grounds for restoration" (*id.* at 93a-94a). The court also noted that the PBGC in 1987 had supported a bill that would have precluded employers

[6] The PBGC had concluded that restoration would increase LTV Steel's costs by about $120 million annually, and that LTV Steel, which had a cash flow of $265 million in 1988, could handle that increase. Pet. App. 114a.

from establishing follow-on plans, but Congress, in amending the Act, did not enact that provision. *Id.* at 97a-99a.

The court then noted a further statement in the legislative history of Section 4047 that restoration is appropriate " 'if some other factor made termination no longer advisible.' " Pet. App. 100a (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974)). However, the court held, "the Record does not support a finding that the PBGC's determination that the 1987 CBA Plans were abusive 'represents a reasonable accommodation of conflicting policies' within Title IV and between Title IV and other non-ERISA laws." Pet. App. 100a. In its view, the three opinion letters the PBGC had issued relating to other follow-on plans were irrelevant because the terminations at issue were "voluntary," whereas the termination here was "involuntary." *Id.* at 100a-101a. It also noted that, under 11 U.S.C. 1113, LTV Steel was required to bargain with the Union about modifications of their collective bargaining agreement even though it was seeking to reorganize. Pet. App. 102a-104a. Although, as the court conceded, "[i]t is not disputed that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and the new plans "substantially achieved that goal," the record, in the court's view, did not contain "any analysis by the PBGC of the differences, as opposed to the similarities, between the old and new plans." *Id.* at 109a.

Turning to the PBGC's contention that, in light of LTV Steel's improved financial condition, it could afford to fund the plans, the district court first stated

that the record "belies the PBGC's contention that an alleged improvement in LTV Steel's financial [condition] was an important factor in the restoration." Pet. App. 110a n.36. It also questioned the PBGC's conclusion that LTV Steel could fund the plans, and held that the administrative record did not support that conclusion. *Id.* at 118a.

The district court also held that the PBGC's restoration procedures were inadequate. Although the court agreed with the PBGC that it had "acted within its authority in attempting to evolve standards for restoration during an ongoing restoration proceeding" (Pet. App. 124a), the court concluded that the PBGC had failed "to set forth those standards with sufficient clarity to permit LTV to challenge them" (*id.* at 125a).

4. The court of appeals affirmed the district court's opinion in all relevant respects. Pet. App. 1a-27a. It introduced its discussion of the merits by stating that "[a]lthough this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight" (*id.* at 16a), and by noting its conclusion that "a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other" (*id.* at 17a). "Rather," the court said, "PBGC focused inordinately on ERISA." *Ibid.* With respect to the PBGC's conclusion that "the adoption of the 1987 CBA Plans * * * constituted an abuse of the termination insurance program," the court determined that the PBGC could not take this factor into account because "[t]he legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration."

Ibid. Like the district court, it noted that Congress in 1987 failed to enact a proposal to outlaw follow-on plans, and stated that its failure to do so "reflects the continuing consensus not to include the establishment of follow-ons as a basis for restoration." *Id.* at 18a.[7]

Like the district court, the court of appeals found "problematic" the PBGC's conclusion that, " '[b]ased on LTV's own cash flow projections, it appears that the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation.' " Pet. App. 22a. It also agreed with the district court that the PBGC had followed inadequate procedures in restoring LTV Steel's plans. *Id.* at 26a.

DISCUSSION

The court of appeals erred in holding that the PBGC, in deciding whether to restore a terminated plan, may not take into consideration the sponsoring employer's adoption of an abusive follow-on plan. Section 4047 authorizes the PBGC to restore plans when it determines restoration to be appropriate, and the PBGC has reasonably concluded that restoration is an appropriate response to the adoption of abusive follow-on plans. The court of appeals' holding, which rests on an improper use of legislative history, threatens to undermine the termination insurance program, a program already seriously in debt. If

[7] The court of appeals continued: "Not only is there no indication that the establishment of follow-ons is impermissible, but PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the 1987 CBA Plans were merely continuations of the old Plans." Pet. App. 19a.

LTV Steel's plans are not restored, the PBGC will be responsible for more than $2 billion in unfunded liabilities, and will be unable to recover at least a quarter of that amount from LTV. Moreover, other companies with underfunded plans are attempting to take advantage of the decision below. Accordingly, review by this Court is warranted.

1. As the PBGC has repeatedly stated, the termination insurance program "was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. To the contrary, Congress has provided that an employer generally may terminate an underfunded pension plan and shift its liabilities to the insurance fund only if the alternative is liquidation. See 29 U.S.C. 1341(c)(2)(B)(ii) (1982 & Supp. V 1987). Moreover, since employees lose some benefits upon termination under the scheme Congress has devised, their unions will help to ensure that termination occurs only as a matter of last resort. That carefully constructed scheme falls apart if employers can shift their liabilities to the insurance fund while adopting new plans that grant the benefits not provided by the PBGC.[8]

Section 4047 is a broad grant of authority to the PBGC. It provides that restoration is warranted in

[8] Although the courts below failed to appreciate the force of the PBGC's position, a New York Times editorial asked: "Should ailing businesses be allowed to dump their current pension liabilities on the government—and then offer supplemental pension benefits to workers in return for cost-cutting concessions? That, incredibly, is what the bankrupt LTV Corporation hopes to do." *A Bad Loophole in the Pension Law* (Aug. 22, 1987). The Washington Post (*Steel Scam* (May 25, 1987)) and the Wall Street Journal (*Keeping Pension Promises* (May 26, 1987)) also editorialized in support of the PBGC's position.

any case "in which the corporation determines such action to be appropriate and consistent with its duties" under ERISA. The PBGC has reasonably determined that restoration is warranted to prevent abusive follow-on plans from being adopted. If an employer cannot provide the benefits it has promised, it ought not be allowed to make good only on the difference between the benefits provided by the PBGC and the benefits promised, while the termination insurance program pays the rest. Otherwise, employers in serious financial difficulty will choose to terminate their underfunded plans, and their unions will not object.[9] The only loser will be the insurance system, which would surely falter.[10]

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[9] Even if, as here, collective bargaining agreements prohibit termination, unions will not object to termination if their members do not suffer as a result. And if an employer cannot satisfy a bankruptcy court that it is in such distress that termination is appropriate under Section 1341, it might nevertheless be able to convince the PBGC to terminate a plan under Section 1342 by refusing to meet its funding obligations, as LTV Steel did. In light of LTV Steel's actions, it seems unrealistic to say, as the district court did in distinguishing the PBGC's opinion letters (Pet. App. 100a-101a), that the termination here was "involuntary."

[10] The PBGC would be able to avoid collapse only if the fee employers are charged to participate in the insurance program—which has increased from $1 per participant in 1974 to a variable rate of $16 to $50 per participant today (see Pet. 4 n.4)—is further increased. However, at some point the fee will be so high that employers with well-funded plans will choose to terminate them and substitute defined contribution plans in their place. (One company, ACO, Inc., reported that the most recent increase led it to terminate its plan because it did not think it ought "to subsidize the poor funding practices of other companies." Chernoff, *Crushed by the Weight*, Pensions & Investment Age 1, 55

Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." The PBGC's construction of Section 4047 is plainly entitled to deference under that standard. Moreover, the case for deference is even stronger here than in *Chevron* since Section 4047 expressly and unambiguously grants the PBGC authority to restore pension plans "in any such case in which [it] determines such action to be appropriate and consistent with its duties." Thus, this case is more like *United States* v. *Morton*, 467 U.S. 822, 834, 835-836 (1984), where an agency was "explicitly delegated authority to construe the statute by regulation," and the Court held that its interpretation must be upheld unless it is " 'clearly inconsistent' with the statute or 'arbitrary.' " Indeed, the delegation here is broader than in *Morton*, since the PBGC has not just been given authority to interpret a statutory provision setting forth the circumstances in which restoration is appropriate, it has been given the very authority to make that determination.

The courts below held that the PBGC may not consider the creation of abusive follow-on plans in making restoration decisions primarily because the legislative history of Section 4047 mentions financial recovery but not follow-on plans. Pet. App. 17a, 93a-94a. But the language of a statute—particularly language expressly granting an agency broad

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(Sept. 4, 1989).) If such terminations become common, as a result of adverse selection only ailing corporations anxious to shift their unfunded liabilities to the PBGC will want to sponsor defined benefit pension plans.

authority—is not modified by examples in the legislative history. It is certainly not modified by legislative history that does not purport to be confining, and the relevant legislative history here notes that, in addition to financial recovery, restoration would be appropriate "if some other factor made termination no longer advisable." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974).[11]

The courts below also erred in concluding that the PBGC improperly failed to take into account statutes other than ERISA, namely the Bankruptcy Code and the National Labor Relations Act (NLRA). This is not a case where any particular provision of those statutes conflicts with the PBGC's actions. In these circumstances, Section 4047 is the controlling provision. Indeed, in enacting that law, Congress was plainly aware that employers attempting to terminate plans would often be in bankruptcy proceedings and that members of labor unions would sometimes be affected by termination decisions. It nevertheless gave the PBGC broad authority to determine when restoration is warranted, and did not direct it

[11] Contrary to the courts below (Pet. App. 18a, 97a-99a), their holding cannot be justified by Congress's actions in 1987, when it considered, but did not enact, a provision that would have expressly authorized the PBGC to prohibit follow-on plans. As this Court has stated, it is difficult to draw any conclusion from congressional inaction. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405, 411 (1962). Moreover, at the time the statute was amended, Congress was aware that the PBGC had just restored LTV Steel's plans (H.R. Rep. No. 391, 100th Cong., 1st Sess. Pt. 1, at 106-107, 178 (1987)), but Congress took no steps to revise Section 4047 to restrict the PBGC's authority. Thus, the conclusion that Congress approved of the PBGC's policy is at least as plausible as any other. Cf. *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

to consider anything other than its duties under ERISA.[12] Moreover, as the PBGC points out in its petition (Pet. 25), "Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws, making it unnecessary—and inappropriate—for PBGC or the court of appeals to balance the spirit of other laws."

2. Like the federal savings and loan insurance program, the pension termination insurance program is in dire financial condition. The PBGC's most recent annual report shows assets of $2.4 billion and liabilities of $4 billion, not including this case. Its deficit has increased dramatically in the last few years, despite increases in the insurance premiums paid by employers. See *Federal Insurance of Private Pension Benefits*, *supra*, at 27; *Promises at Risk*,

[12] The courts below also erred in concluding (Pet. App. 19a, 109a) that the PBGC did not adequately show that LTV Steel's follow-on plans substantially replace the benefits lost as a result of the termination. It was "not disputed that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and that the new plans "substantially achieved that goal." *Id.* at 109a. Moreover, the administrative record showed that the follow-on plans "replace[d] a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination[,] * * * provid[ing] up to 100 per cent of the difference and no less tha[n] 90 per cent of the amount not provided by PBGC." R. 224. In this circumstance, there is no reasonable basis for the court of appeals' requirement that the PBGC offer a more "detailed comparison" of the provisions of the old and new plans. Pet. App. 19a. In any event, the discussion of this point by the court of appeals was evidently not a basis for its judgment, since it concluded on other grounds that the character of any follow-on plans could not be considered by the PBGC.

supra, at 19; Pet. 4 n.4. And if restoration is not permitted in this case, the PBGC will be responsible for additional unfunded liabilities of more than $2 billion. Although the PBGC has a claim against LTV under Section 1362, it has in the past recovered only eight percent of employers' unfunded liabilities in bankruptcy proceedings. *Promises at Risk, supra*, at 28. Moreover, because LTV Steel's plans were terminated before the 1987 amendments took effect, the maximum amount the PBGC may recover under Section 1362(b) in this case is 75 percent of the unfunded liabilities.[13] Accordingly, it will lose, at the least, approximately half a billion dollars if the plans are not restored.[14] Thus, the PBGC's deficit will increase by not less than one-third, and may double, as a result of this case.[15]

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[13] In addition to its claim under Section 1362(b), the PBGC has a claim against LTV for due and unpaid minimum funding contributions under 29 U.S.C. 1362(d) (Supp. IV 1986). However, that claim is for less than 25 percent of the total amount of the liabilities LTV is attempting to shift to the PBGC, and any sum that the PBGC collects on that claim will reduce the amount of its claim under Section 1362(b).

[14] Although Section 1362(b) now permits the PBGC to recover in full, in light of its past experience the PBGC cannot reasonably hope to recover anything near 100 percent of an employer's unfunded liabilities except in unusual cases.

[15] LTV suggested in the district court that the PBGC wanted to restore its plans, even though they would have to be reterminated soon, merely to take advantage of the 1987 amendments permitting it to seek 100 percent recovery. The district court found no merit to this contention. Pet. App. 120a-122a. Moreover, the PBGC would run serious risks by restoring a plan that was likely to be reterminated, since in the interim participants would accrue benefits under the restored plans (which could be very substantial in this case if a plant were shut down). And in this case, the PBGC found that, in light of its financial turnaround and the general improvement in the domestic steel industry, LTV Steel could fund the plans, so that retermination is unlikely, at least in the foreseeable future.

In addition, other companies in financial trouble are sure to attempt to follow LTV Steel's lead, and terminate (or force the PBGC to terminate) plans with the understanding that they will provide lost benefits to their employees. Indeed, Wheeling-Pittsburgh Steel, which had terminated pension plans with unfunded liabilities of half a billion dollars, recently sought a declaratory judgment that it could implement follow-on plans, and the bankruptcy court, following the decision here, recommended that it be allowed to do so. *USWA* v. *PBGC*, Bankr. No. 85-793 (W.D. Pa. June 30, 1989). Thus, even in the absence of a conflict in the circuits, review is warranted now in light of the significant effect of this case on the PBGC's deficit and the substantial dislocations that will result if other companies terminate their pension plans in the wake of the decision below.

Finally, the abusive follow-on question is plainly ripe for review since the court of appeals has prohibited the PBGC from considering the issue in determining whether to restore LTV Steel's plans. Were the PBGC to decide on remand that, in the absence of this factor, restoration is not warranted, the PBGC would then presumably be foreclosed from appealing its own decision. As a result, between $500 million and $2 billion would be added to the PBGC's deficit without the opportunity for review by this Court.[16]

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[16] We do not believe that, by themselves, the other issues that the PBGC has presented—(1) whether the courts below

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1989

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erred in rejecting the PBGC's conclusion that LTV Steel could afford to fund the restored plans and (2) whether the PBGC failed to follow adequate procedures before restoring the plans—warrant review by this Court. However, we disagree with the conclusions reached by the courts below on both issues, and we agree with the PBGC that the requirements imposed by the courts present it with significant practical problems. See Pet. 20-23, 27-30.

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No. 89-390 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

—v.—

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, AND WILLIAM W. SHAFFER,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF AMICUS CURIAE OF ARMCO, BETHLEHEM STEEL CORPORATION, INLAND STEEL INDUSTRIES, INC., NATIONAL STEEL CORPORATION, AND USX CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation hereby move this Court for leave to file a brief *amicus curiae* in support of the Petition for Writ of Certiorari of the Pension Benefit Guaranty Corporation in the captioned case, pursuant to Rule 36.1 of the Supreme Court Rules.

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation (collectively the "Steel Companies") are five of the six largest domestic steel producers. The sixth company and the third largest domestic steel producer is LTV Steel Company ("LTV Steel"), a subsidiary of LTV Corporation ("LTV Corp."). The Steel Companies produce 47 percent of the steel manufactured in the United States. All of the Steel Companies fund separate pension plans that are currently covered by the Pension Benefit Guaranty Corporation ("PBGC") which was created under Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1301, *et seq*. Together, the Steel Companies' pension plans pay benefits to thousands of retirees and other beneficiaries. Participants (employees, retirees and other beneficiaries) in the retirement plans maintained by the Steel Companies constitute a majority of all the participants in pension plans in the domestic steel industry.

The Steel Companies have a direct interest in the outcome of this Petition for Writ of Certiorari for two reasons. First, as sponsors of pension plans and contributors to the federal insurance program, the Steel Companies have an interest in a strong and well-funded PBGC Insurance Program. The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including the Steel Companies, by jeopardizing the financial health of the insur-

ance program, and by in all likelihood forcing yet another increase in PBGC insurance premiums.

Second, the Steel Companies, as major competitors of LTV Steel, have been and will continue to be adversely impacted by LTV Corp.'s transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against the Steel Companies in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. All of the Steel Companies are attempting to modernize and restructure facilities, but none of the Steel Companies has shed its pension liabilities onto the PBGC, and each continues to meet or exceed ERISA's minimum funding standards. By comparison, LTV Steel has diverted resources that would otherwise have gone to meet its pension funding obligations to modernize its facilities, reduce its production costs and to otherwise dramatically improve its competitive position, all while continuing to provide its workers with essentially the level of pension benefits that existed prior to LTV Corp.'s bankruptcy. This artificial competitive advantage gained by LTV Steel through abuse of the federal pension insurance program subverts the declared national policy in favor of fostering and maintaining a strong domestic steel industry without a federal bailout.

The PBGC's Petition for Writ of Certiorari presents important questions regarding the integrity of the national pension insurance fund managed by the PBGC and the continued protection of its participants and beneficiaries. These issues are of great significance to the Steel Companies because if the decision of the Second Circuit is allowed to stand, LTV Steel will have received, in effect, a bailout loan from the federal government, one which grants a decisive competitive advantage to LTV Steel and distorts competition within the steel industry, and one which seriously weakens the financial integrity of the federal pension insurance program. Such a result, if allowed to stand, subverts the national policy in favor of a strong domestic steel industry and undermines the purpose of Title IV of ERISA.

For the foregoing reasons, the Steel Companies seek leave of this Court to file the following brief *amicus curiae* in support of the PBGC's Petition for Writ of Certiorari.

Respectfully submitted,

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*Counsel for the Steel Companies requested and received consent of the PBGC to file the accompanying Brief Amicus Curiae. Counsel for the PBGC contacted counsel for Respondents, LTV Corp. and LTV Steel, on behalf of the Steel Companies, but Respondents declined to give their consent.

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INTEREST OF AMICI

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation (collectively the "Steel Companies") are five of the six largest domestic steel producers. The sixth company and the third largest domestic steel producer is LTV Steel Company ("LTV Steel"), a subsidiary of LTV Corporation ("LTV Corp.").[1] The Steel Companies produce 47 percent of the steel manufactured in the United States. All of the Steel Companies fund separate pension plans that are currently covered by the Pension Benefit Guaranty Corporation ("PBGC") which was created under Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1301, *et seq.* Together, the Steel Companies' pension plans pay benefits to thousands of retirees and other beneficiaries. Participants (employees, retirees and other beneficiaries) in the retirement plans maintained by the Steel Companies constitute a majority of all the participants in pension plans in the domestic steel industry.

The Steel Companies have a direct interest in the outcome of the PBGC's Petition for Writ of Certiorari for two reasons. First, as sponsors of pension plans and contributors to the federal insurance program, the Steel Companies have an interest in a strong and well-funded PBGC fund. The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including the Steel Companies, by jeopardizing the financial health of the insurance program, and by, in all likelihood, forcing yet another increase in PBGC insurance premiums. *See* Petition of PBGC for Writ of Certiorari at 4 n.4 (hereafter "Petition").

Second, the Steel Companies, as major competitors of LTV Steel, have been and will continue to be adversely impacted

[1] LTV Corp. and its subsidiary, LTV Steel, will be referred to collectively as "LTV."

by LTV's transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against the Steel Companies in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. All of the Steel Companies are attempting to modernize and restructure facilities, but none of the Steel Companies has shed its pension liabilities onto the PBGC, and each continues to meet ERISA's minimum funding standards. The decision below, allowing LTV to convert the pension guaranty program into a federal bailout program for one steel manufacturer runs contrary to the national policy, articulated by both Congress and the Executive Branch, of fostering and maintaining a strong domestic steel industry.

ARGUMENT IN SUPPORT OF PBGC'S PETITION FOR WRIT OF CERTIORARI

The PBGC's Petition for Writ of Certiorari should be granted because the Petition presents issues of grave national importance to the steel industry and to all participants and beneficiaries of the Pension Benefits Guaranty Corporation's pension insurance fund. LTV skillfully placed itself in a position that caused the PBGC to terminate certain of its pension plans and then objected to responsible efforts on the part of the PBGC to restore those plans when LTV subsequently demonstrated its willingness and ability to fund the pension plans. LTV, in its post-bankruptcy dealings with the PBGC and its own labor unions, sought to achieve the twin goals of shedding the cost of its pension plans while maintaining the high level of pension benefits for its workers in order to buy labor peace, and obtain unfair economic advantages over its competitors within the domestic steel industry.

Ultimately, the PBGC's Restoration Notice should be enforced because restoration furthers the purpose of Title IV of ERISA as well as the national policy of supporting the domestic steel industry. The Second Circuit erred by failing to recognize these policies and by misconstruing the "arbitrary and capricious" standard of judicial review of an administrative determination. Indeed, the PBGC's determination that LTV's follow-on plans are an abuse of the pension system and that LTV is and has been capable of meeting its pension obligations is fully supported by the Administrative Record as well as other post-termination public financial information made available by LTV.

I. The Failure of the Second Circuit to Enforce the PBGC's Restoration Order Subverts the Express Congressional Intent to Create the PBGC as a Pension Insurance Fund of Last Resort and to Maintain a Strong and Competitive Domestic Steel Industry.

As a program of last resort, the Title IV Insurance Program is designed to protect the pension expectations of American workers, not to bail out a financially troubled company. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980). The Second Circuit's decision makes the PBGC in effect an investor in LTV Steel rather than a guarantor of pension benefits, and the decision threatens the financial integrity of the termination insurance program. In addition, the decision frustrates the national policy expressed by Congress of fostering a strong and modernized domestic steel industry.

A. The PBGC's Restoration Notice Fully Accords with the Goals and Policies of ERISA.

Title IV of ERISA was enacted to provide an insurance fund of last resort. It reflects, and was intended to set at

rest, the congressional concern for catastrophies faced by employees who lose vested benefits if a business or pension plan fails. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. at 13, *reprinted in* Legislative History of the Employment Retirement Income Security Act of 1974, Volume III, p. 4962 ("ERISA LEG. HIST."). Prior to the enactment of ERISA, Congress recognized that employees might well "receive nothing or less than they had expected" because employers were not required to insure their pension liabilities. *Id.* This problem was dramatized in the Senate Report accompanying ERISA, which referred to the Studebaker plant closing at South Bend, Indiana. Some 4,000 employees between the ages of 40 and 60 received only approximately 15 percent of their vested benefits, despite the fact that the Studebaker plan's vesting was fairly generous and the plan funding would have been adequate had the plant remained open. *Id.* In response to this "great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated," Congress established a pension insurance program under Title IV of ERISA. *Id.* at 4973. The congressional purpose was to insure certain classes of pension benefits of American workers when the employer was incapable of funding its pension liabilities.

Congressional statements at the time of passage of ERISA confirm that Congress intended Title IV funds to be used only *in extremis*, to protect the beneficiaries of covered pension plans from "a loss of benefits as a result of inadequate assets to meet the vested liabilities of the plan." 120 Cong. Rec. H4283 (1974), *reprinted in* II ERISA LEG. HIST. at 3382. The insurance was to come into play only if the sponsoring company was entirely unable to fund its pension liabilities as a result of the termination of the business. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. 87, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4971, and I ERISA LEG. HIST. at 1155; *see also Nachman Corp. v. PBGC, supra*, 446 U.S. at 375 (Congress intended to insure that a worker actually receives the benefit that has been promised upon retirement if he has fulfilled the conditions required to obtain that benefit).

Further, the 1986 amendment of ERISA, the Single-Employer Pension Plan Amendment Act ("SEPPAA"), 29 U.S.C. §1001 *et seq.*, underscores congressional concern about a potential abuse of the termination insurance program. In enacting SEPPAA, Congress recognized that "the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and other premium-payers." 29 U.S.C. §1001b(a)(4). Accordingly, in 1986, before the termination of LTV's plans, Congress modified Title IV for the additional purposes of "increase[ing] the likelihood that participants and beneficiaries under single employer defined benefit pension plans will receive their full benefits," and "provid[ing] for the transfer of unfunded pension liabilities onto the single-employer pension plan termination system only *in cases of severe hardship*." 29 U.S.C. §1001b(c)(3) and 1001b(b)(2) (emphasis added).[2]

The Second Circuit concluded that the PBGC did not have authority to restore a pension plan to an employer upon the determination that the employer's follow-on plans constituted an abuse of the pension insurance fund, on the grounds that Congress did not specifically enumerate establishment of abusive follow-on plans subsequent to an involuntary termination as a ground for restoration. *PBGC v. LTV Corp.*, 875 F.2d 1008, 1017 (2d Cir. 1989) (PGBC App. 17a). Although Congress may not have enumerated follow-on plans as a specific ground for restoration, Congress has expressly given the PBGC the authority and discretion to restore terminated plans, and described the goals and responsibilities of the PBGC in ERISA's statement of purpose in the broad-

[2]Although the Pension Protection Act in 1987 gave the PBGC the right to recover from the employer 100 percent of benefits paid out under a terminated program, the PBGC's restoration authority still remains of paramount importance in avoiding abuse of the pension insurance program. As the PBGC explains in its Petition, the PBGC has historically recovered only a few cents on the dollar in a recovery action. *See* Petition at 15 n.14.

est terms. *See SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (independent agency is not limited to exercising powers that are specifically enumerated, but is empowered to act to carry out the intent of Congress in adopting the underlying statute).

The statutory provision empowering the PBGC to restore pension plans to employers contains a broad grant of discretion to the PBGC for determining administratively the circumstances under which restoration is necessary and appropriate. Section 4047 of ERISA, 29 U.S.C. §1347 reads:

> In the case of a plan which has been terminated under Section 1341 or 1342 of this title, the [PBGC] is authorized in any such case in which the [PBGC] determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pre-termination status . . . .

The Second Circuit's conclusion that the PBGC cannot restore LTV's pension plans without a direct and specific authorization from Congress is incorrect, as the PBGC's restoration notice in this instance is clearly within the broad grant of discretion allowed by Congress under ERISA and SEPPAA. The PBGC's decision to restore the LTV plans is fully in accord with the goals of preserving the long term strength of the PBGC pension insurance program, and having the PBGC assume responsibility for a pension plan only in the last resort when an employer is unable to meet its pension obligations. The mere fact that Congress has not enumerated a power does not deny a federal agency that power, as long as it falls within the discretion allowed the agency and is consistent with the goals and policies of the

underlying authorizing statute. *Chenery, supra*, 332 U.S. at 208–09.[3]

The PBGC's conclusion that LTV's financial condition had substantially improved since its plans were terminated, provides ample additional, independent justification for the PBGC's Restoration Notice.[4] This conclusion underscores the fact that LTV was not so much unable as *unwilling* to fund its pension liabilities. To allow LTV Steel to avoid its pension obligations is to ratify the pernicious idea that a troubled company can transfer its pension liabilities to the PBGC's insurance program and use the savings derived therefrom to recapitalize, modernize and revitalize the company as a going concern. Such a result is not the purpose for which ERISA was enacted, nor for which the PBGC and the pension insurance program were created. The decision below conflicts with congressional intent with regard to ERISA and turns the PBGC into a federal bailout program for trou-

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[3]The Second Circuit also based its conclusion on an analysis of post-termination and restoration legislative history, involving consideration by Congress of additional amendments to ERISA in 1987. The Second Circuit found persuasive the fact that Congress "considered and rejected the idea of prohibiting the establishment of follow-on plans and making the establishment of such plans a basis for a restoration decision." *PBGC v. LTV*, 875 F.2d at 1017 (PBGC App. 18a.) As a matter of statutory interpretation, no conclusion can be derived from Congressional action or inaction in 1987, absent a specific statement on the part of Congress that a given amendment was rejected because Congress believed that the PBGC should not have such power. In fact, the decision of Congress not to enact specific amendments prohibiting follow-on plans and making the establishment of such plans a basis for restoration is equally consistent with the conclusion that Congress believed that the PBGC *already had the power to restore pension plans to an employer in the face of an abusive follow-on plan.* Congress may not have wanted to *limit* the PBGC's discretion in determining under what circumstances a follow-on plan fell into the category of abusive. Thus the general rule of statutory interpretation that no inference may be drawn from legislative action or inaction after the enactment of the original statute should be applied in the instant case and the ERISA and SEPPAA provisions applied as they stood at the time the PBGC restored the plans. *See, e.g., Waterman Steamship Corp. v. United States*, 381 U.S. 252, 268–69 (1965) ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *United States v. Price*, 361 U.S. 304, 313 (1960); *Fogarty v. United States*, 340 U.S. 8, 14 (1950) (abortive action of subsequent Congress cannot supplant the contemporaneous intent of the Congress which enacted the original act).

[4]*See infra*, Section II at 15.

bled companies, a result which, in practice, could bankrupt the federal pension insurance program altogether.[5]

The PBGC's original decision to terminate LTV's pension plans was justified in late 1986 and early 1987, given the state of the steel market and prospects for the domestic steel industry as a whole. Yet, the bleak outlook predicted in late 1986 failed to materialize, and the steel industry, including LTV Steel, has experienced a strong resurgence. LTV was in fact wholly able to meet its pension obligations by mid-1987, and its successful fight against restoration has resulted in what is, in effect, a federal bailout of LTV Steel. Allowing this subsidy to continue subverts the policy of ERISA as well as the strength of the pension insurance program, and places the burden of that subsidy on LTV's competitors and other plan sponsors through increased premiums.[6]

B. The Decision of the Second Circuit Frustrates the National Goal of Fostering a Strong and Competitive Steel Industry without Federal Funds.

Special concern has been expressed by members of Congress about the health and survival of the domestic steel industry because of its importance to both the national economy and national security. The PBGC's Restoration Notice to LTV accords with this congressional concern by maintaining the delicate competitive balance among the steel producers that is so vital to fostering and nurturing a strong domestic steel industry. Conversely, the decision of the Second Circuit to vacate the Restoration Notice has granted LTV significant unfair competitive advantages over other steel producers who are competing in the steel market while continuing to fund their pension plans. The Second Circuit's decision distorts and weakens the competitive environment in the domestic steel industry.

[5] *See* Petition at 4 ("Despite . . . repeated increases [in annual premiums] the PBGC currently has liabilities of $4 billion and assets of only $2.4 billion, leaving a deficit of more than $1.5 billion, *exclusive of the liabilities at issue in this case.*") (emphasis added).

[6] Based on historical precedent, a rise in premium costs is a very real and immediate concern. *See* Petition at 4 n.4.

In 1988, Congress considered the Steel and Aluminum Energy Conservation and Technology Competitiveness Act of 1988, 15 U.S.C. §§ 5101–5110. Speaking in support of the bill, Congressman Walgren of Pennsylvania stated that modernization of the steel industry is critical because:

> continuous and adequate supply of steel is the foundation of our economy and our national security. Many industries, like automobiles, depend on steel; many communities have steel at there core. The National Academy of Science has observed that there are four times as many indirect jobs in industries depending upon steel for business per year as there are direct jobs in the steel industry.

Representative Walgren also emphasized that production of military hardware depends on steel and that the United States must maintain a strong steel industry capable of providing for national defense needs. 134 Cong. Rec. H10019 (Oct. 12, 1988).

Congressional support for a strong steel industry was also expressed in the Findings and Purposes of the Steel Imports Stabilization Act, introduced in 1984. Section 802(c) of the Act stated the finding that implementation of a "national [program] for the steel industry will substantially improve the economy and employment in both the steel and iron ore-producing sectors." Pub. L. 98-573, Title VIII, Sections 801–808 (Oct. 30, 1984) (now codified as an amendment to 19 U.S.C. § 2253; *see* Notes to 19 U.S.C. §2253, 1989 Supp.).

Members of Congress and the Executive Branch have expressed with equal clarity a preference that the steel industry modernize and reorganize without significant federal intervention in the form of financial support. For instance, Congressman Ernest Konnyu of California, speaking in support of the Steel and Aluminum Energy Conservation and Technology

Competitiveness Act of 1988, stated that it is the private sector's investments, rather than those of the federal government, that are necessary to maintain a viable domestic steel industry. 134 Cong. Rec. H10020 (Oct. 12, 1988). President Reagan issued a Steel Decision in 1984, in which he rejected government intervention in the form of protectionist legislation, choosing to rely instead on fair trade and market forces to maximize opportunity for the domestic steel industry to recover and modernize. 49 Fed. Reg. No. 184, 36813 (Sept. 20, 1984). The House of Representatives recently voted to extend the Steel Stabilization Act, 19 U.S.C. § 2253 *et seq.*, which allows the President to extend the Voluntary Restraint Agreements negotiated with steel exporting nations. Speaking in support of the extension, Representative Gaydos repeated Congressional concern for the health of the steel industry: "[T]he steel industry is basic to the economic health of this country . . . [and] a strong steel industry is vital if the United States is to remain competitive in the world market." 135 Cong. Rec. H6418 (Oct. 2, 1989).

By vacating the PBGC's Restoration Notice, the Second Circuit has directly undercut the goal of fostering a strong national steel industry. As a practical matter, the Second Circuit's decision will necessarily give LTV an unfair advantage over other major steel producers in efforts to reinvest and modernize to become more competitive. Although the financial condition of LTV has now improved sufficiently to enable it to meet its funding obligations for the three terminated plans, *see infra* Section II at 16–19, LTV, unlike the other steel producers, has been freed from those obligations by the Second Circuit's decision. As a consequence, LTV has gained approximately $200 million each year for use to modernize its industrial base in the course of reorganization. By comparison, the Steel Companies have met or exceeded the minimum funding requirements of ERISA for their pension plans, and continue to do so, all the while struggling to allocate sufficient resources for capital improvements in order to remain competitive in the market.

C. Failure to Enforce the Restoration Notice Provides LTV Steel With Unfair Competitive Advantages.

Failure to restore the pension plans is projected by the Steel Companies to provide LTV with a cost advantage of about $20 per ton,[7] which in turn will favorably affect LTV's profit margins. Such a cost advantage will also result in access by LTV to capital at more satisfactory terms, making LTV more attractive to lenders, shareholders and other investors. Moreover, it gives LTV additional flexibility to maintain and even increase its market share. While the immediate competitive impact of this bailout has been cushioned somewhat by stronger steel industry results, the transfer of LTV's unfunded pension liabilities to the PBGC is likely to become more significant if the demand for steel products moderates.

During the current period of Chapter 11 protection, LTV has greatly improved its competitive position by making substantial capital expenditures which were enabled in large part by using the funds resulting from termination of its pension plans. LTV's record of capital spending since its Chapter 11 filing has been carried out on an impressive scale. For example, following the bankruptcy filing, LTV made significant capital expenditures at its Indiana Harbor Works and at its Cleveland plants, including a number of "enhancements" at these facilities.[8] Actual and projected capital enhancements for the Indiana Harbor Works and the Cleveland facility together total in excess of one billion dollars.

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[7]PBGC projects that restoration of the LTV plans would result in an incremental annual pension cost to LTV of about $200 million. If the LTV plans are not restored, the incremental pension cost not incurred by LTV represents a "cost advantage" to LTV Steel that would be equivalent to about $20 per ton based on the current level of shipments.

[8]As used herein, the term "enhancements" refers to expenditures in excess of base spending required to maintain facilities at current operating capacity and efficiency.

These capital expenditures will reduce LTV's costs and improve the efficiency of its operations, thereby providing it with a substantial future cost advantage over other steel companies. This cost advantage will also enable LTV to continue to make more extensive capital expenditures than it otherwise would have made had it continued to pay its pension obligations.

The cost advantage gained by LTV if its pension plans are not restored also provides it with the flexibility to pursue alternate strategies designed to further enhance its competitive position in the steel market. Based on LTV's average realized price in 1987 of $495 per ton of steel (1987 LTV Annual Report, p. 10), a $20 per ton cost advantage would increase its net income by an amount equivalent to about 4% of sales. This is a particularly significant increase in a mature industry that had an average net *loss* equivalent to 2.6% of net sales for the period 1979 to 1987 and for which the *highest* average annual steel related net income for American Iron and Steel Institute ("AISI") companies as a group was 3.8%. (1987 Annual AISI-Statistical Report).

From 1987 through the present, demand for steel has been relatively high. In such an environment, LTV has had no real need to use its cost advantage to maintain or increase its market share. However, in the event of a decrease in domestic demand or an increase in steel imports, such a cost advantage would give LTV considerable pricing flexibility to reduce prices and maintain its market share to the detriment of other steel companies which have continued to meet their pension obligations. This is particularly unfair and unwarranted when the ability of LTV to afford the restored plan has been demonstrated by the PBGC.

Notwithstanding the improved recent performance by the steel industry, steel producers continue to face problems regarding needed modernization and restructuring programs. In the mid-1980's, stock prices and stockholder's

equity in steel companies declined in the face of the strong dollar, increased foreign competition, and the adverse competitive impact of outmoded domestic production facilities. Major restructuring costs associated with plant shutdowns had an adverse effect upon the credit position of the steel industry. As a result, the major steel producers suffered reductions in credit ratings, limiting their ability to attract capital for restructuring and modernization needs. By comparison, despite LTV's bankruptcy, LTV's attractiveness to investors and lenders is now greatly enhanced by the PBGC's assumption of LTV pension liabilities of about two billion dollars. LTV can be expected to emerge from bankruptcy to operate into the foreseeable future in a significantly stronger financial position than before its plans were terminated.

D. The Second Circuit's Decision May Invite Other Employers to Shed Pension Liabilities onto the PBGC, thus Further Burdening the Fund and its Participants.

The liabilities transferred to the PBGC by LTV will place an unfair higher premium burden on other steel producers and other employers whose premiums fund the Title IV insurance fund. Speaking about the plight of the PBGC under the burden of LTV's plan terminations, Senator John Heinz of Pennsylvania noted that allowing the company to "dump" its retirement obligations on the federal government essentially transfers the company's liabilities to its competitors through higher insurance premiums and a greatly underfunded pension benefit guaranty fund. 133 Cong. Rec. S11387 (Aug. 6, 1987). Representative William Clay of Missouri, speaking in opposition to a proposal to increase PBGC premiums substantially, stated that "LTV Corporation is the most prominent example of management that has chosen to put its money elsewhere [rather than contributing to its pension plans] and now expects to have others pay for the pension benefits it promised." 133 Cong. Rec. H11971 (Dec.

21, 1987). Indeed, permitting one major actor in the steel market to gain additional funding for investment by abusing the Title IV pension insurance program weakens the domestic steel industry and leaves the enormous deficit thereby created to be made up through increased premium payments from other steel companies and other employers.

The District Court in this case recognized the logic of the PBGC's concern that, without restoration, the path of LTV Steel may become "irresistible" to other steel companies. *In re Chateaugay Corporation*, 9 E.B.C. 2236, 2249 (S.D.N.Y. 1988) (PBGC App. 110). Indeed, other steel companies might conclude that they have no other choice. The resulting financial disruption could hurt the steel industry and cripple the PBGC at the same time. The danger of this unfortunate prospect was recognized in the Senate by Senator David Durenburger of Minnesota, speaking in support of the Steel Retirement Benefits Funding Act (S.1811):

> [W]hen the LTV Corp. filed a Chapter 11 bankruptcy petition last year, it sent a clear signal to its domestic competitors. The message from LTV was simply that the easiest way for a steel company to cut cost was to declare bankruptcy and unload the company's pension liabilities onto the Pension Benefit Guaranty Corporation. . . . Moreover, it is no secret that other steel companies have considered following LTV's path in an effort to resolve their pension liability responsibility.

133 Cong. Rec. S14901 (Oct. 22, 1987). Thus, the decision of the Second Circuit could have a corrosive effect on the will of the domestic steel industry to continue to meet pension obligations, and runs directly counter to the policy of fostering and maintaining a strong domestic steel industry without federal funds.

The twin goals of preserving the termination insurance program under Title IV of ERISA to protect the pensions of

American workers when a true disaster occurs, while at the same time fostering a strong and more competitive domestic steel industry, are clearly enhanced by enforcement of the Restoration Notice issued by the PBGC. The Second Circuit's decision significantly undermines these goals. Review by this Court is necessary to preserve the integrity of the insurance program and to restore the competitive forces required for a strong domestic steel industry.

II. The PBGC Correctly Found that LTV is Able to Meet its Minimum Funding Obligations to the Terminated Plans.

The financial condition of LTV has improved significantly since the termination of its plans in January, 1987. This improvement reflects the favorable economic change which affected all domestic steel companies, beginning in 1987 and continuing to the present. LTV, like other companies in the steel industry, benefited from a reduction in imports, increased domestic demand, and improvement in productivity and prices. LTV's improved financial condition cannot, therefore, be wholly attributed to the Chapter 11 reorganization process. One significant advantage which LTV Steel derived from the Chapter 11 proceedings, however, was the ability to reject unfavorable supply contracts—a benefit that should continue after reorganization and should be unaffected by the restoration of the LTV pension plans.

LTV's improvement was readily apparent at the time of the PBGC's Restoration Notice. Moreover, LTV has continued to show increasing financial strength. The PBGC correctly recognized LTV's improved financial condition when it ordered restoration. Further analysis of LTV based upon public documents also demonstrates that LTV is fully able to meet its pension obligations under the terminated plans. These factors alone are sufficient to support the PBGC's decision to order restoration.

A. Analysis of Results in 1987 and 1988 and Comparison with the Performance of Similarly Situated Major Competitors of LTV Steel Further Demonstrates that LTV Steel is Able to Meet its Pension Fund Obligations.

An analysis of LTV's public disclosure of financial information shows that LTV is and has been capable of meeting its pension obligations under the terminated plans. LTV Corp. and LTV Steel cannot dispute that their overall financial picture improved substantially in 1987.[9] In 1987, LTV Corp.'s liquidity improved by more than $480 million over 1986 (1987 LTV Corp. Annual Report, p. 2), and LTV experienced a net cash flow from operations of $761 million.[10] This positive result was achieved after capital expenditures of $344 million and repayment of bank debt and principal repayments on long-term debt of $450 million.

LTV Steel accounted for a significant portion ($370 million) of LTV Corp.'s overall 1987 cash flow from operations. During 1987, LTV Steel also invested $286 million in capital expenditures to modernize facilities which will further enhance its future competitive position. In addition, LTV Finance paid $300 million and LTV Steel paid $137 million of debt outstanding under bank credit facilities. (1987 LTV

[9]The PBGC's administrative decision was predicated on LTV's improved financial condition as shown by the first two quarters of 1987. We have set forth additional data confirming PBGC's determination that LTV's positive results would continue for the full 1987 year in an Appendix to this Brief. *See* App. at A-1.

[10]The cash flow data referred to in this section of the brief is set out in the Appendix hereto. Cash flow data is used because measurement and consideration of net cash flow, stated in terms of available cash and marketable securities, is more relevant to the question of an employer's ability to fund its pension obligations than "net income."

Steel Form 10-Q, p. 35).[11] At the same time, the improved profitability of LTV Steel permitted LTV Corp. to maintain a balance of cash and marketable securities in the amount of $585 million at the end of 1987.[12]

LTV Corp.'s financial condition continued to improve substantially in 1988. For calendar year 1988, LTV Corp.'s net cash flow was $423 million after $413 million in capital expenditures. *See* App. A-1. Thus, a total cash balance of $1.009 billion was achieved by year end 1988. Although LTV Steel had zero net cash flow for 1988, it produced that figure by making capital expenditures of $351 million as part of an aggressive modernization program, and by transferring $372 million in cash to LTV Corp. Without these expenditures and contributions, LTV Steel would have accounted for a significant portion of LTV Corp.'s 1988 net cash flow. *See* App. A-2. Moreover, because of bank credit facilities in the form of $479 million in revolving credit availability and $136 million in letters of credit availability (1988 LTV Corp. Annual Report, p. 17), LTV Corp. achieved an even better liquidity position, in excess of $1.6 billion at the end of 1988.

[11]Subsequent to its Chapter 11 filing and through the first six months of 1988, LTV Steel transferred all available cash to LTV Corp., including $175 million in the first six months of 1988 thereby increasing its cash advance to LTV Corp. to $433 million at June 30, 1988. (LTV Corp. June 30, 1988 Form 10-Q, pp. 17-18).

[12]These overall 1987 results stemmed in large part from the elimination of LTV Steel's unfunded pension liabilities, even though Chapter 11 related factors also contributed to the outcome. (1987 LTV Corp. Annual Report, p. 2).

Summarized, the liquidity of LTV Corp. at year-end 1988 was as follows:

LTV CORPORATION
($ Millions)

Cash Balance on 12/31/88	$1,009
Revolver Facilities	479
Letter of Credit Facility	136
Total Liquidity 12/31/88	$1,624

Accordingly, LTV has had considerable financial flexibility to make a substantial cash settlement with creditors under a reorganization plan, and will be better able to absorb any cyclical downturn which may occur in the steel industry. Thus, the 1988 results further confirm the PBGC's determination that LTV can afford the terminated pension plans on a continuing basis without jeopardizing the reorganization process.

LTV's ability to fund its plans is further illustrated by the actual experience of its competitors in meeting their pension funding obligations. For example, Bethlehem Steel Corporation ("Bethlehem"), has business and pension plan characteristics substantially similar to LTV Steel and it also experienced improved financial results in 1987 and 1988. The different manner in which LTV Steel and Bethlehem have addressed their pension commitments underscores the competitive implications and inequities that result from failure to restore the LTV plans.

Public records show that, as of January 1, 1986, the beginning of the plan year immediately prior to the termination

of the plans at issue in this case, the Bethlehem pension plan and the LTV pension plans were underfunded by roughly the same amount—about $1.7 to $2.0 billion. The minimum ERISA required pension contributions (exclusive of waived and unpaid amounts)[13] for the 1986 plan year (payable by September 15, 1987) for both LTV and Bethlehem would have been about $150 to $200 million. Of course, even though its cash flow was sufficient to fund the terminated plans, LTV's pension contribution in 1987 was zero because of the plan terminations. By comparison, Bethlehem did not terminate its pension plan in 1987, and made contributions totaling $289 million for the 1987 plan year and still experienced an increase in its cash liquidity of $89 million from the end of 1986. (1987 Bethlehem Steel Corp. Annual Report; 1988 Bethlehem Steel Corp. Third Quarter Report.) Furthermore, while the minimum ERISA funding requirements for the Bethlehem pension plan for the 1987 and 1988 plan years (payable by September 15 of the following year) were $174 million and $34 million, respectively, Bethlehem actually contributed $289 million to its pension plan for the 1987 plan year and $691 for the 1988 plan year. Other Steel Companies have also fulfilled their pension obligations despite pressure to divert cash into modernization of facilities and other projects to improve their competitive positions.

In summary, analysis of LTV's financial situation and the actions of other major steel producers with unfunded liabilities similar to LTV's demonstrates that LTV can fund its obligations under the terminated plans while continuing to reorganize and modernize its facilities.

[13]Contributions to the LTV plans for 1984, totalling $175 million, were waived by the IRS in 1985. Waiver requests for $215 million in the 1985 plan year contributions were denied. LTV Steel made some contributions in 1986 to amortize the 1984 waivers, but no contributions were made for the 1985 plan year.

CONCLUSION

For the foregoing reasons, the Steel Companies respectfully support the Petition of the Pension Benefit Guaranty Corporation for a Writ of Certiorari and respectfully urge this Court to grant the Writ.

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APPENDIX

CASH FLOW EXPERIENCE
($ Millions)

LTV Corporation

	1987	1988
Net Income	$ 503	$(3,154)
Depreciation Expense	250	
Working Capital Changes	128	67
Other	(120)	3,592
Net Cash From Operations Excl. Interest & Past Service	761	747
Investing Activities		
Capital Expenditures	(344)	(413)
Proceeds From Sale of Property	11	93
Other	(4)	28
Financing Activities		
Principal Pmts-Bank & L-T Debt	(450)	(31)
Principal Pmts-Pension & L-T Debt	—	—
Net Increase/(Decrease) in Cash	(26)	423
Cash balance (end of year)	$ 585	$ 1,009

CASH FLOW EXPERIENCE
($ Millions)

LTV Steel Co.

	1987	1988
Net Income	$ 323	$(2,502)
Depreciation Expense	214	200
Working Capital Changes	175	48
(Increase)/Decrease in A/R from Affiliates	(300)	40
Other	(42)	2,888
Net Cash From Operations	370	672
Investing Activities		
Capital Expenditures	(286)	(351)
Transfer (To)/From LTV Corp.	50	(372)
Proceeds From Sale of Property	9	53
Advances to Raw Material Affil.	(6)	0
Financing Activities		
Principal Pmts-Bank & L-T Debt	(137)	(2)
Principal Pmts-Pension & L-T Debt	—	—
Net Increase/(Decrease) in Cash	0	0
Cash balance (end of year)	$ 0	$ 0

(7)

No. 89-390

IN THE

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OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

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---

REPLY BRIEF FOR THE PETITIONER

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1. In their opposition to PBGC's certiorari petition, the LTV respondents ignore the most important aspect of this case—the devastating impact of transferring to the already debt-laden pension insurance program more than $2 billion of LTV's unfunded pension liabilities. Moreover, the invitation of the court of appeals to other companies with seriously underfunded pension plans to follow LTV's example will convert the pension insurance program into an unintended bailout for financially troubled companies. *See* Petition 12-17.[1]

---

[1] The Equity Committee's assumption that the Plans would be restored on financial grounds on remand from the court of appeals' decision, *see* Equity Opp. 9, even if correct, ignores this aspect of the case. *See infra* at 5 n.5.

2. The Pension Protection Act does not diminish the importance of this case. Those amendments did not change section 4047, the principal statutory provision at issue, and even if they had been in effect, would not have changed the events or analysis in this case. The PPA amendments, moreover, do not alleviate the follow-on abuse problem even in cases in which they do apply. Indeed, in several cases currently before the PBGC that are governed by PPA, employers and unions—encouraged by the court of appeals—are attempting to couple follow-on plans with termination. The stringent requirements the PPA imposes will have no immediate effect on the huge underfunding that already exists in many large plans. Nor will they deter other employers from doing exactly what LTV did here—compel the PBGC to terminate their pension plans and then establish follow-on plans that continue the former pension arrangements at the expense of the federal insurance program. *See* Petition 16 n.14. Thus, even after PPA, follow-on plans still present a serious risk to the pension insurance program. When each case can add as much as half a billion dollars or more to PBGC's already substantial deficit, the nation runs the risk that by the time another case reaches the Court, the pension insurance program will be in the midst of an irreparable financial crisis.

3. The LTV respondents erroneously portray this case as nothing more than a factual dispute about the adequacy of the administrative record. In doing so, they simply ignore the important legal questions presented by the PBGC and the Solicitor General.[2] Thus, the LTV respondents do not even discuss, much less attempt to defend, the court of appeals' central holding that, notwithstanding the exceptionally broad delegation of discretion in section 4047, PBGC's authority to restore a terminated plan is limited to one *example* cited in the legislative history.[3] That holding has serious implications not only for the PBGC, but also for other government agencies. As the Solicitor General states in his *amicus curiae* brief in support of the petition, "All federal agencies have a strong interest in correcting this erroneous approach to statutory construction—an approach that would significantly reduce agencies' powers under statutory grants of authority." Sol. Gen. brief 2.

Nor can the LTV respondents deny the legal significance of the case by claiming that PBGC's alleged failure to consider the "policies" of bankruptcy and labor law made its restoration decision arbitrary and capricious. This argument assumes the answer to a second significant question of law presented by PBGC and the Solicitor General—whether it was error for the court of appeals to require PBGC (or other federal agencies like the FDIC) to subordinate its express grant of broad regulatory authority under ERISA to inchoate policies purportedly underlying other laws. Indeed, respondents' argument confirms the dangerous doctrinal implications of the court of appeals' erroneous holding. The LTV respondents suggest that whenever a court can identify a "policy" of an-

[2] Rather than defend the legal analysis of the courts below, the respondents argue that PBGC failed to provide an adequate explanation of its policy against follow-on plans. Respondents do not discuss, however, the substance of the three opinion letters previously issued by the agency, the affidavits of PBGC's Executive Director and Chief of Actuarial Policy that were included in the administrative record, or the numerous other occasions prior to restoration, discussed in the petition, where LTV was advised of PBGC's policy and its determination that LTV had violated it. As the LTV respondents themselves concede, PBGC sought repeatedly to prevent the establishment of the follow-on plans before taking administrative action. These facts are undisputed. Thus, this is not a case that will turn on lack of notice of the agency's policy, or of the standards by which it is applied.

[3] They likewise make no attempt to defend the court of appeals' remarkable conclusion that Congress's *inaction* on a 1987 House Ways and Means Committee proposal reflects congressional consensus not to include follow-on abuse as a basis for a restoration decision.

other law with which a party's conduct is "consistent," LTV Opp. 18, it can use it to overturn agency action, giving no deference to the agency's interpretation of its enabling statute. LTV Opp. 17 n.10. This holding too is of great concern to other agencies. *See* Sol. Gen. brief 2.

Finally, in attempting to portray the financial issue as a factual matter, LTV Opp. 21-23, the respondents assume the answer to the question of law presented by the petition—whether it was error for the court of appeals to substitute its judgment for the PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances. The facts underlying PBGC's financial improvement standard—that the risks leading the agency to terminate the Plans had ceased to exist—are undisputed.

4. There is neither logic nor reason to LTV's assertion that the "abuse" question is "superfluous." LTV Opp. 21 n.14. Indeed, both the LTV respondents and the Equity Committee concede that the decision of the court of appeals prohibits the PBGC from considering follow-on plan abuse as a basis for restoration on remand.[4] And follow-on plan abuse is, as a matter of law, sufficient in itself to support a restoration decision (*see* Pet. App. 159a-179a), at least where, as here, there is no significant chance of immediate retermination. *See* Sol. Gen. brief 18 n.15. Moreover, the PBGC could well conclude on remand that LTV's financial improvement does not satisfy the unworkable financial standard dictated by the court of appeals, even though it satisfied the standard

[4] The LTV respondents state, for example, that "the Court of Appeals found that the PBGC's 'abuse' rationale for its LTV restoration decision had no statutory basis in ERISA, bankruptcy law or labor law." LTV Opp. 16. *See also* LTV Opp. 18 (court of appeals correctly found that PBGC's abuse rationale "had no statutory basis"). The Equity Committee similarly admits that the court of appeals concluded that section 4047 "does not permit PBGC to base a restoration decision on the establishment of follow-on Plan abuse." Equity Opp. 14-15.

used by the PBGC. In that case, the PBGC could not restore the plans or obtain further review. *See* Sol. Gen. brief 19.[5] Consequently, the holding of the court below—that *only* financial improvement can be considered under section 4047—is plainly ripe for review now.

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October 1989

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[5] The PBGC could also determine on remand that LTV's financial improvement does warrant restoration, even under the court of appeals' unworkable standard. If that determination were upheld or not challenged, the court of appeals' erroneous follow-on holdings would be left uncorrected, leaving the agency powerless to protect the insurance program from abuse, at least in that circuit.

(9)

No. 89-390

IN THE

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OCTOBER TERM, 1989

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Petitioner,
v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; and WILLIAM W. SHAFFER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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383pp

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TABLE OF CONTENTS

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[1] The documents from PBGC's Administrative Record listed below are in chronological order, in accordance with Rule 30.5 of this Court's rules. In the Administrative Record, many of these documents were attachments to other documents, as shown in the index found at pages 369-75 of this Joint Appendix. The pages at which the documents may be found in the Administrative Record are indicated as "AR ———." The entire Administrative Record is contained in Exhibits to the Joint Appendix filed in the court of appeals. The original pagination was retained in the Exhibit volumes.

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 87 Civ. 7261 (RWS)

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
October 9, 1987	Complaint by Pension Benefit Guaranty Corporation filed in U.S. District Court for the Southern District of New York.
December 10, 1987	Motion and brief of Plaintiffs Miller and Shaffer in support of Motion to intervene filed.
December 30, 1987	Motion of Banctexas Dallas to intervene filed.
December 30, 1987	Response and Answer of Banctexas Dallas filed.
December 30, 1987	Stipulation and Order allowing the Official Committee of Unsecured Creditors of The LTV Corporation and the Subcommittee of Parent Creditors to intervene in this action, setting January 15, 1988 as date of service for initial pleadings of Intervenors and setting January 22, 1988 as date of service for Responses to pleadings or papers of Intervenors filed.
December 31, 1987	Answer of The LTV Corporation and LTV Steel Company filed.
December 31, 1987	Stipulation authorizing the LTV Bank Group to intervene filed.
January 15, 1988	Answer and Counterclaims of Parent Subcommittee of the Official Committee filed.

DATE	PROCEEDINGS
January 19, 1988	First Amended Answer and Counterclaims of Defendants The LTV Corporation and LTV Steel Company, Inc. filed.
January 20, 1988	Motion of Banctexas Dallas to intervene granted.
January 29, 1988	Plaintiffs PBGC's Notice of Motion and Motion for Summary Judgment filed.
February 1, 1988	Motion of Miller and Shaffer to Intervene individually and as representatives of pension plan participants granted and filed.
February 1, 1988	Answer of LTV Bank Group filed.
February 1, 1988	Stipulation and Order authorizing The Indenture Trustees to intervene and accepting their Proposed Answer as their initial pleading filed.
February 3, 1988	Complaint by Miller and Shaffer for intervention as class action filed.
February 5, 1988	Motion of LTV Opposing Intervention of Miller and Shaffer denied.
February 8, 1988	Intervenor Complaint of the Official Committee of Equity Security Holders of the LTV Corporation with cross claim filed.
February 11, 1988	Amended Intervenor Complaint of the Official Committee of Equity Security Holders of The LTV Corporation with cross claim filed.
February 16, 1988	Answer of Defendant LTV filed.
February 27, 1988	Response and Answer of Banctexas Dallas filed.

DATE	PROCEEDINGS
February 29, 1988	Motion for leave for Solidarity USA Inc, an organization of LTV Steel retirees, to file a brief Amicus Curiae in support of Pension Benefit Guaranty Corporation's Motion for Summary Judgment on its Complaint filed.
February 29, 1988	Answer of the Pension Benefit Guaranty Corporation to First Amended Counterclaims of The LTV Corporation and LTV Steel Company, Inc. and the Official Committee of Unsecured Creditors of the LTV Corporation filed.
February 29, 1988	Answer of The LTV Corporation and LTV Steel Company filed.
March 15, 1988	Answer of the Pension Benefit Guaranty Corporation to Counterclaims of the Parent Subcommittee of the Official Committee of Unsecured Creditors of the LTV Corporation filed.
April 4, 1988	Answer of Pension Benefit Guaranty Corporation to amended cross claim filed.
June 22, 1988	Opinion of Judge Sweet filed.
August 19, 1988	Pension Benefit Guaranty Corporation's Notice of Motion for an Order for Entry of Judgment filed.
September 8, 1988	Grant of Motion for an Order for Entry of Judgment filed.
September 12, 1988	Judgment in favor of The LTV Corporation and LTV Steel Company, Inc. filed.
October 6, 1988	Pension Benefit Guaranty Corporation's Notice of Appeal filed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 88-6244, 88-6246, 88-6252

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
October 18, 1988	Copy of District Court docket entries and Notice of Appeal on behalf of Appellant Pension Benefit Guaranty Corporation filed.
October 18, 1988	Notice of Appeal on behalf of David Miller and William Shaffer filed.
October 25, 1988	Cross-Notice of Appeal on behalf of LTV Bank Group filed.
November 14, 1988	Record on Appeal filed.
November 22, 1988	Joint Appendix volumes 1-6 filed.
November 22, 1988	Exhibits to Joint Appendix volumes 1a, 1b-7 filed.
December 6, 1988	First Supplement to Record on Appeal filed.
December 20, 1988	Second Supplement to Record on Appeal filed.
January 13, 1989	Case heard before Van Graafeiland, Meskill and Miner, C.JJ.
January 17, 1989	Third Supplement to Record on Appeal filed.
May 12, 1989	Opinion and Judgment of the Court of Appeals for the Second Circuit.

DATE	PROCEEDINGS
May 12, 1989	Judgment filed.
September 22, 1989	Notice of Filing of Petition for writ of certiorari by Petitioner Pension Benefit Guaranty Corporation dated September 11, 1989 filed.
November 1, 1989	Certified copy of Order Granting Petition for writ of certiorari filed.

[LOGO]

THE LTV CORPORATION

December 10, 1986

To: Members of the Committee of Unsecured Creditors

From: R. L. Guyett

Enclosed is a copy of The LTV Corporation's 1987-1988 Operating Plan. You will note that several changes (most of which are not significant) have been made to the final plan from the presentation made to you last week in New York. The most significant revision, a balance sheet reclassification of receivables to cash in the final plan, increased 1987 and 1988 year-end cash by $22 million and $48 million, respectively. Additionally, a change in interest expense deemed accruable in Chapter 11 caused net income of LTV Aerospace and Defense Company to increase by $13.5 million and $14 million in 1987 and 1988, respectively.

Please direct your questions relative to the Plan to Malva Rabinowitz of Touche Ross & Co.

(A copy of the slides used in the New York presentation—with the above adjustments—will be sent under separate cover).

PRIVILEGED AND CONFIDENTIAL
SUBJECT TO CONFIDENTIALITY AGREEMENT
BETWEEN PBGC AND THE LTV CORPORATION

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

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BETWEEN PBGC AND THE LTV CORPORATION

Note: All references in the document to "1986 forecast" financial data are according to The LTV Corporation's Financial Forecast dated October 1986 adjusted for a) September actual results and, b) the balance sheet impact of the third quarter 1986 special charge of $2.1 billion.

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1987-1988 OPERATING PLAN

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SUMMARY

THE LTV CORPORATION AND SUBSIDIARIES 1987-1988 OPERATING PLAN

I. CONSOLIDATED FORECAST

Executive Summary

The following is a financial summary of The LTV Corporation's (LTV or the Company) 1987 and 1988 Operating Plan:

($ Millions)	1987	1988
Net Cash Flow from Operations	$ 288	$ 316
Revenues	$6,899	$6,801
Operating Income	$ 426	$ 411
Net Income	$ 403	$ 400
Property Additions	$ 404	$ 350
Current Ratio	3.26	3.61
Cash Balance	$ 740	$1,056

LTV operates in three distinct business environments. The organization of each *individual* operating unit and its relationship to the corporate entity are driven by the demands of its own particular industry. LTV Corporation is comprised of the following principal operations:

Operating Group	Business/Entity
Steel Group	LTV Steel Co., Inc. LTV Tubular Products Company L-S Electro Galvanizing (LSE)
Aerospace and Defense Group	Aircraft Products Group (APG) Military Aircraft Commercial Aircraft Modernization Support
	Missiles and Electronics Group (M&EG) AM General Missiles Division Sierra Research
Energy Products Group	Distribution and Production Equipment Drilling Equipment Oil States Industries Division

Traditionally, LTV has referred to its "operating groups" in reporting consolidated operating results. This presentation contains references to both LTV "operating groups" and to specific "legal entities" which comprise the LTV family of companies. Legal entity data is provided to assist those creditors whose interest is in a specific LTV legal entity.

The LTV Steel Group (LTVS) produces commodity type products in a highly competitive industry that is driven primarily by levels of GNP growth and automobile production. LTV Energy Products Company (LTVEP), while also operating in a commodity-like environment, serves a market which will vacillate depending on changing world energy needs and international political forces. LTV Aerospace and Defense Company (LTVAD) is primarily affected by the level of national defense spending and the health of the commercial aircraft industry. However, because LTVAD produces a broad range of "high" and "low" technology items and parts for current *and* replacement products, it is less susceptible to cyclical macroeconomic variables.

In response to changing industry and macroeconomic environments, LTV recently reorganized certain of its operating units into a more efficient structure. These changes are discussed more fully as the individual groups are addressed.

As part of its ongoing strategic planning and analysis the Company has prepared a two year operating plan. Historically, the Company's Plan has covered one year. The enclosed Operating Plan for the years 1987 and 1988 is prepared and presented in part for the following additional purposes:

—To present a reasonable two-year plan to the creditors and other constituencies with a vested interest in LTV's reorganization.

—To demonstrate the initial effects of the Chapter 11 filing.

—To set attainable goals and targets for LTV and its operating units and to describe the strategies that LTV intends to follow to accomplish these goals; certain operating strategies are still being developed, particularly as they may be affected by opportunities provided by the bankruptcy code.

—To provide an estimate of the operating results and cash flow that these operations are expected to generate.

Environment and Assumptions

Different aspects of the macroeconomic environment influence LTV's businesses. *Steel shipments and prices* are most greatly affected by GNP growth, steel imports, automobile production and aggregate domestic capital spending; *energy equipment sales*, by inflation, oil prices and OPEC policy; and *aerospace and defense contracts and awards*, by GNP, defense spending levels and commercial aircraft prospects. Forecasts for and explanations of the impact of each of these items are discussed in detail in the following sections. Steel sales which are cyclical are most sensitive to changes in forecast variables and are, therefore, the most difficult to project.

Other assumptions underlying the Plan are as follows:

—No asset sales are included in the Plan for 1987 or 1988.

—No payments to the Steel and Energy defined benefit pension plans are assumed. Pension accruals are recorded for current service only.

—Interest expense during 1987 and 1988 has been accured only on debt which has been preliminarily evaluated as fully or over secured. The Plan assumes that no interest will be paid during 1987 and 1988, except for interest on the bank debt

as provided for in the proposed Debtor in Possession financing recently negotiated with the Company's bank group.

—The Plan includes $1 million per month of bankruptcy related expenses.

—The Plan assumes no major changes in existing bankruptcy law.

—Interest income at a rate of 6% on the average monthly free cash balances has been included in the Plan.

Financial Results

Net Sales and Operating Income (Exhibit A)

The 1987 Plan anticipates $426 million of operating income on sales of $6.9 billion. The following table summarizes these amounts by group and compares them with forecast 1986.

	($ Millions)			
	Net Sales		Operating Income	
	1987 Plan	1987 B/(W) Than 1986	1987 Plan	1987 B/(W) Than 1986
Group Operations				
Steel	$4,125	$(299)	$268	$268
Aerospace and Defense	2,559	94	160	43
Energy Products	222	(79)	(2)	37
Eliminations	(7)	(1)	—	—
Total	$6,899	$(285)	$426	$348

The 1987 net sales and revenues of $6.9 billion represent a 4% decrease from 1986. Most of the anticipated Steel Group decrease is due to lower apparent domestic demand and the downward pressure on prices resulting from the overcapacity among domestic and world producers.

The operating income for 1987 is projected to be $426 million, $348 million better than the 1986 forecast. LTV Steel's 1987 operating income is expected to be $268

million better than forecast 1986 due primarily to full year realization of certain costs avoided in the Chapter 11 environment and the avoidance of certain income statement costs and expenses resulting from the 1986 special charges, partially offset by lower shipments and selling prices. LTVAD operating income is expected to be $43 million better than forecast 1986 due primarily to the Hummer cost adjustment of $35 million recorded in 1986. Higher MLRS and ATACMS sales will be substantially offset by lower B-1B and ADP's program sales. The Energy Products' operating loss is expected to be $37 million better than forecast 1986 due primarily to reductions in operating costs and the benefit from the 1986 write-down of unprofitable assets and product lines.

Interest and Other Expense (Exhibit D)

	($ Millions)		
	Forecast	Operating Plan	
	1986	1987	1988
Interest Expense	$187	$44	$46
Interest Income, Bankruptcy Expense and Other	7	(25)	(39)
Total Expense (net)	$194	$19	$ 7

Net interest and other expenses are expected to be $19 million in 1987, $175 million lower than 1986. The improvement is primarily due to limited interest expense accruals (according to bankruptcy procedures) and higher interest income due to higher cash balances, partially offset by estimated bankruptcy expense.

Consolidated Cash Flow From Operations (Exhibit F)

Net consolidated cash generation from operations is expected to total approximately $288 million and $316 million in 1987 and 1988, respectively. The following table summarizes the 1987 (quarterly) and 1988 cash flow of Exhibit F by major legal entities. Additional cash flow information is provided in the subsequent sections.

	($ Millions)					
	1987-1988 Operating Plan					
	1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year 1987	Year 1988
Cash Generated/(Used)						
LTV Steel Company, Inc.	$83.2	$105.4	$74.5	$ 7.3	$270.4	$234.5
LTV Steel Tubular Co.	9.7	(1.6)	(1.9)	(6.0)	0.2	(9.0)
LTV Aerospace and Defense Co.	(30.8)	(10.2)	(17.1)	64.3	6.2	79.8
LTV Energy Products Co.	(1.3)	(0.6)	0.6	7.1	5.8	(2.1)
*LTV Parent and Other	(5.2)	1.0	(3.5)	12.7	5.0	12.8
	$55.6	$94.0	$52.6	$85.4	$287.6	$316.0

* Includes LTV Sales Finance.

LTV Steel Company, Inc. is expected to generate cash during 1987 of $270 million primarily reflecting operating profits, depreciation and a decrease in working capital in excess of capital expenditures. LTV Aerospace and Defense Company expects to generate $6 million of cash reflecting operating income of $160 million and depreciation which are substantially offset by increased inventory requirements and capital expenditures. LTV Energy Products Company plans to generate approximately $6 million of cash.

1988 Operating Plan (Exhibit C)

The 1988 Plan anticipates $411 million of operating income on sales of $6.8 billion, both of which are slightly lower than the expected 1987 results. The Steel Group anticipates a continued downward trend in selling prices caused by global overcapacity to erode both sales and operating income. LTVAD also expects lower sales and operating income in 1988 primarily due to the completion of the B-1B program at APG. The Energy Products Company expects a moderate increase in sales and operating income in 1988 caused by the anticipated increase in oil prices combined with the depletion of the existing natural gas surplus.

The 1988 Plan expects the funds generated through operations to exceed corporate requirements by $316 million. LTV Steel Company, Inc. expects to generate cash of $234 million in 1988 which is a 13% decrease from the 1987 level, due primarily to lower operating profits and lower cash generated from working capital partially offset by lower capital expenditures. LTVAD anticipates an $80 million generation of cash in 1988, a $74 million improvement over 1987 which is primarily due to lower use of cash in working capital and a decrease in property additions. LTV Energy Products Company anticipates $2 million cash usage in 1988.

LTV Projected Consolidated Tax Position

At the beginning of 1986 and 1987, it is estimated that LTV will have available the following net operating loss carryforwards:

	($ Billions)	
	For Tax Purposes	For Book Purposes
As of January 1, 1986	$2.3	$1.3
As of January 1, 1987	$2.7	$4.0

The Tax Reform Act of 1986 provides for a 15 year carryback by steel companies of their investment tax credit carryforwards existing at December 31, 1986. Under the law, the LTV consolidated federal income tax group should receive a federal income tax refund of approximately $150 million. This refund has *not* been included in this Plan pending resolution of the potential IRS claims arising out of the pension waiver denial.

Major Risks and Opportunities

Risks inherent to the steel industry present the greatest degree of uncertainty to LTV in achieving this Plan. These include:

—Weaker than expected economic growth forcing additional downward pressure on prices.

—Lower than expected automobile vehicle production, as automotive is the largest steel consuming market and LTV Steel is the leading supplier to that market.

—An unexpected work stoppage at any LTV Steel plant.

—USX predatory pricing at the conclusion of their strike.

Risk issues in LTVAD include:

—Keeping Hummer production within its current cost structure.

—Not achieving a major award on the A-7 Strikefighter and an MLRS international program.

The risk issues for LTVEP include:

—Oil and gas prices may not stabilize as projected.

—Inability to regain lost market share and favored position with suppliers and vendors.

—OPEC's ability to hold the established production quotas.

Because the Company has attempted to present a realistic forecast to its constituencies, the Plan does not include certain opportunities which, if realized, could generate additional cash flows for LTV. Possible opportunities which could improve results and/or cash flow over the 1987 Plan are:

—Stronger than expected GNP growth.

—Cost reductions in excess of planned levels, including on-going LTV Steel programs involving "greenfield manning," higher yield and increased direct rolling/hot charging. In LTVAD, favorable cost performance on the B-1B could improve Aircraft Products' income.

—Continued or new work stoppages at major competitors.

—A cold winter which could spur gas well drilling in the spring of 1987, reducing the expected seasonal softness of the oil/energy market.

—Disposals of non-operating LTV Steel or LTV Energy units.

—Improvement in the steel market for bar products.

EXHIBIT A

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

1986 SUMMARY OPERATING RESULTS
($ Millions)

	Actual		Forecast	
	1/1 to 7/16/86	7/16 to 9/30/86	4th Qtr.	1986 Year *
Sales & Revenues				
Steel Group	$2,514.3	851.1	1,058.4	4,423.8
Aerospace and Defense Group	1,175.1	595.1	694.5	2,464.7
Energy Products Group	179.7	43.5	78.3	301.5
Eliminations	(3.6)	(0.5)	(2.0)	(6.1)
Total	$3,865.5	$ 1,489.2	$1,829.2	$ 7,183.9
Operating Income/(Loss)				
Steel Group	$ (86.3)	$ 51.6	$ 34.4	$ (0.3)
Aerospace and Defense Group	39.1	34.9	43.4	117.4
Energy Products Group	(22.1)	(9.3)	(7.4)	(38.8)
Total	(69.3)	77.2	70.4	78.3
Interest & Other Expense	(168.6)	(11.4)	(14.1)	(194.1)
Pretax Income/(Loss) Before Taxes & Special Charges	(237.9)	65.8	56.3	(115.8)
Special Charges	(535.0)	(2,100.0)	—	(2,635.0)
Income Tax (Charge)/Credit	8.8	—	(1.1)	7.7
Net Income/(Loss)	$ (764.1)	$(2,034.2)	$ 55.2	$(2,743.1)

* The 1986 forecast results are the results provided in October 1986 in the Financial Data for The LTV Corporation and updated for September actual results including the $2.1 billion Special Charge.

EXHIBIT B

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

EXECUTIVE SUMMARY
($ Millions)

	Forecast	Operating Plan	
	1986	1987	1988
Financial Position at Year-End			
Cash and Short Term Securities	$ 454	$ 740	$1,056
Working Capital	1,719	1,900	2,165
Total Assets	5,454	5,885	6,239
Property, Plant & Equipment (net)	2,668	2,842	2,944
Deferred Liabilities Pursuant to Chapter 11	6,097	6,097	6,097
Shareholders' Deficiency	(2,050)	(1,647)	(1,247)
Other Financial Information			
Ratio of Current Assets to Current Liabilities	3.26	3.26	3.61
Property Additions	$ 208	$ 404	$ 350
Operating Leases	$ 20	$ 55	$ 68
Operating Statistics			
Steel—Industry Shipments (Million Tons)	69.7	67.9	67.9
LTV Group Shipments (000 Tons)	9,260	8,693	8,657
Market Share	13.3%	12.8%	12.8%
LTV Raw Steel Production (Million Tons)	11.1	10.1	10.0
Aerospace and Defense—New Orders ($ Billions)			
Missiles and Electronics Group	$1.6	$1.7	$1.5
Aircraft Products Group	0.9	0.8	0.7
Total	$2.5	$2.5	$2.2
—Backlog ($ Billions)			
Missiles and Electronics Group	$3.0	$2.5	$2.2
Aircraft Products Group	1.1	0.9	0.9
Total	$4.1	$3.4	$3.1
Energy—U.S. Rigs in Operation (Average)	925	750	825

EXHIBIT C

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

SUMMARY OF CONSOLIDATED OPERATIONS
($ Millions)

	1987 Operating Plan					
	1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
NET SALES & REVENUES						
Steel Group	$1,088.4	$1,075.0	$ 996.1	$ 965.2	$4,124.7	$4,079.8
Aerospace and Defense Group	644.2	632.7	621.0	661.3	2,559.2	2,491.8
Energy Products Group	53.8	51.1	54.9	62.6	222.4	237.1
Eliminations	(1.8)	(1.8)	(1.8)	(1.8)	(7.2)	(7.2)
Net Sales & Revenues	$1,784.6	$1,757.0	$1,670.2	$1,687.3	$6,899.1	$6,801.5
OPERATING INCOME/(LOSS)						
Steel Group	$ 65.9	$ 79.6	$ 61.7	$ 60.7	$ 267.9	$ 251.9
Aerospace and Defense Group	40.4	39.3	39.6	40.5	159.8	157.3
Energy Products Group	(1.3)	(0.9)	(0.5)	1.1	(1.6)	2.1
Operating Income	105.0	118.0	100.8	102.3	426.1	411.3
Interest Expense	(10.6)	(10.9)	(11.0)	(11.2)	(43.7)	(45.8)
Interest Income	9.0	9.5	10.6	11.6	40.7	54.5
Other *	(4.0)	(4.0)	(4.1)	(4.0)	(16.1)	(16.1)
Income Before Taxes	99.4	112.6	96.3	98.7	407.0	403.9
Taxes on Income	(1.0)	(1.0)	(1.0)	(1.0)	(4.0)	(4.0)
Net Income	$ 98.4	$ 111.6	$ 95.3	$ 97.7	$ 403.0	$ 399.9

* Includes estimated Chapter 11 expenses of $1 million per month.

EXHIBIT D

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

INTEREST (INCOME)/EXPENSE AND OTHER
($ Millions)

	Operating Plan 1987	1988
INTEREST EXPENSE		
Interest on Long-Term Debt	$17	$17
Interest on Bank Debt	35	35
Other Interest	3	2
Capitalized Interest	(11)	(8)
Total	44	46
ADMINISTRATIVE EXPENSE/(INCOME NOT ALLOCATED TO OPERATING INCOME		
Interest Income	(41)	(55)
Bankruptcy Expense	12	12
Other	4	4
Total	(25)	(39)
TOTAL INTEREST (INCOME)/EXPENSE & OTHER	$19	$ 7

EXHIBIT E

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING POSITION

STATEMENT OF CONSOLIDATED FINANCIAL POSITION
($ Millions)

	Forecast	Operating Plan	
	12/31/86	12/31/87	12/31/88
CURRENT ASSETS			
Cash and short-term securities	$ 454	$ 740	$ 1,056
Receivables (net)	844	809	822
Inventories	1,100	1,110	1,036
Other current assets	81	80	80
Total Current Assets	2,479	2,739	2,994
CURRENT LIABILITIES			
Notes payable to banks	2	—	—
Accounts payable	246	261	240
Pre-petition current	139	63	63
Other accrued liabilities	370	512	523
Income taxes payable	2	2	2
Current maturities of long-term debt	1	1	1
Total Current Liabilities	760	839	829
WORKING CAPITAL	1,719	1,900	2,165
NONCURRENT ASSETS			
Property, plant and equipment (net)	2,668	2,842	2,944
Investments and other noncurrent assets	307	304	301
Total Assets Less Current Liabilities	4,694	5,046	5,410
LESS NONCURRENT LIABILITIES			
Plant closing reserves	317	242	190
Minority interest and other	226	250	266
Pre-petition deferred	6,097	6,097	6,097
Total Noncurrent Liabilities	6,640	6,589	6,553
SHAREHOLDERS' DEFICIENCY			
Redeemable preferred stock, including liquidating preference	104	104	104
Excess of liabilities and redeemable preferred stock over assets	$(2,050)	$(1,647)	$(1,247)
Current Ratio	3.26	3.26	3.61

EXHIBIT F

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

STATEMENT OF CONSOLIDATED CASH FLOW
($ Millions)

	Forecast 1986	Operating Plan 1987	Operating Plan 1988
SOURCES OF CASH			
Net Income/(Loss)	$(2,743.1)	$403.0	$399.9
Depreciation and Amortization	239.6	236.2	239.7
Special Charges	2,635.0	—	—
Stock Issuable for Employee Costs *	23.2	18.8	18.8
Net Cash from Working Capital Items Other Than Cash, & Current Maturities of Long-Term Debt	159.9	107.4	51.0
Cash Generated from Operations After Working Capital	314.6	765.4	709.4
Stock Issued For:			
Payment of Interest on Long-Term Debt	14.3	—	—
Exchange for Debt	14.0	—	—
Employee Benefit Plans	17.0	—	—
Disposition of Assets Hold for Sale	250.2	—	—
Total Sources of Cash	610.1	765.4	709.4
USES OF CASH			
Property Additions	208.4	404.0	350.0
Other Uses/(Sources)—(net)**	4.2	73.8	43.4
Total Uses	212.6	477.8	393.4
Net Sources of Cash from Operations Before Debt Changes	397.5	287.6	316.0
Debt (Repayment)/Borrowing	44.6	(1.7)	—
Net Increase in Cash Position	$ 442.1	$285.9	$316.0

* As per current labor agreement.

** Includes projected costs of non-operating steel units charged to reserve accounts of $52.4 million in 1987 and $47.2 million in 1988.

EXHIBIT G

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

SUMMARY OF PRE-PETITION DEFERRED LIABILITIES
($ Millions)

	Forecast 12/31/86	1987 Operating Plan 3/31/87	6/30/87	9/30/87	12/31/87	12/31/88
Bank Debt-Deferred						
LTV Aerospace Defense Company	$ 225	$ 225	$ 225	$ 225	$ 225	$ 225
LTV Aerospace Export Financing	10	10	10	10	10	10
LTV Sales Finance Company	300	300	300	300	300	300
LTV Steel	134	134	134	134	134	134
Total	669	669	669	669	669	669
Other Debt-Deferred						
LTV Parent	912	912	912	912	912	912
LTV Steel Company, Inc.	906	906	906	906	906	906
LTV Aerospace/Defense Company	16	16	16	16	16	16
LTV Energy Products Company	2	2	2	2	2	2
LTV Holdings Company	30	30	30	30	30	30
LTV International	40	40	40	40	40	40
Republic Overseas Finance	90	90	90	90	90	90
Total	1,996	1,996	1,996	1,996	1,996	1,996
Other Pre-Petition Deferred Liabilities	3,432	3,432	3,432	3,432	3,432	3,432
Total Pre-petition Deferred Liabilities	$6,097	$6,097	$6,097	$6,097	$6,097	$6,097

EXHIBIT H

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

DETAIL OF PRE-PETITION DEFERRED LIABILITIES BY MAJOR LEGAL ENTITY
($ Millions)

	LTV Consol.	LTV Steel Co., Inc.	LTV Energy Prod. Co.	LTV Aerospace and Defense	LTV Tubular Prod. Co.	All Other
Bank Debt	$ 669.4	$ 134.4	$ —	$235.0	$ —	$ 300.0
Accounts Payable	515.3	465.6	22.6	8.7	12.2	6.2
Accrued Interest	59.6	24.3	0.1	2.5	—	32.7
Accrued Pension Claims	2,246.8	2,063.8	20.6	0.2	64.4	97.8
Accrued Other Benefits	141.9	137.9	0.1	2.4	0.6	0.9
Plant Rationalization Costs	225.2	192.5	31.1	—	—	1.6
Long Term Debt	1,996.0	905.9	1.7	16.4	0.3	1,071.7
Long Term Debt-Interco.	—	—	311.6	0.8	37.5	(349.9)
Other Liabilities and Deferrals *	242.8	225.3	20.4	26.4	38.9	(68.2)
Total	$6,097.0	$4,149.7	$408.2	$292.4	$153.9	$1,092.8

* Includes other pre-petition intercompany accounts.

STEEL

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

II. LTV STEEL GROUP

Overview

LTV Steel was formed in 1984 upon the merger of Jones and Laughlin Steel Corporation (LTV's subsidiary) and Republic Steel Corporation and includes the following entities:

—LTV Steel Company, Inc.
—LTV Steel Tubular Products Company
—L-S Electro Galvanizing (LSE)
—LTV Holdings

The following pages summarize the 1987-1988 Operating Plan for the LTV Steel Group.

Environment

Macroeconomic Assumptions

In forecasting macroeconomic conditions for this plan, LTV Steel's primary source of data and modeling was Data Resources, Inc. ("DRI"). In addition, LTVS reviewed a wide variety of other economic forecasts and spent time talking (and listening) to its customers. This along with the groups own industry expertise was used to forecast how the macroeconomic environment ultimately will affect the level of domestic steel shipments and demand for individual products.

The overall economy is assumed to exhibit the same sluggish growth over the next two years as has been experienced during 1986. Real gross national product is expected to grow 2.7% in 1987 and 3.0% in 1988. U.S. industry is likely to continue to suffer from:

—large trade deficits
—high import levels
—excess capacity
—drastic cutbacks in energy markets

Although the trade weighted value of the dollar has declined more than 20% from its 1985 peak, trade response may lag by about a year. Imports are likely to remain higher than the President's Voluntary Restraint Agreement (VRA) target levels as foreign sources struggle to maintain market share even at the cost of lower gross margins. The on-going strength of the dollar relative to currencies of major steel exporters such as Canada and South Korea represents a continued difficult situation for the steel industry. The prime rate is forecast at 8% in 1987 and 7.7% in 1988. Inflation is expected to remain at historically low levels as indicated by a GNP deflator of 2.5% to 3.5%. This Plan does not forecast a recession. LTVS believes GNP must grow at about 4% per year to keep steel consumption static. With projected GNP growth below that level and with disincentives for investment created by the negative impacts of tax reform (which promises limited growth in capital spending), domestic consumption of steel (shipments plus imports less exports) is forecast to decline from 89.3 million tons in 1986 to 87.1 million tons in both 1987 and 1988. The VRA program should limit direct steel imports to about 23% of apparent consumption, resulting in domestic steel shipments of 67.9 million tons in both 1987 and 1988. As Exhibit Q indicates, this forecast is consistent with the forecasts of other economic studies.

Steel Industry Assumptions

Important steel industry indicators suggest that major steel markets will also exhibit mostly sideways to slightly downward levels of activity. These markets include automotive, housing, appliance, energy, conversion and containers and packaging.

Automotive represents the largest steel consuming market, accounting for almost 18% of mill shipments in 1985 (about 29% of LTVS shipments). Total car sales during the Plan period are expected to remain around 11 million units. However, the domestically produced portion of those 11 million units (including production of Japanese companies in the U.S.) will likely decline to 7.6 million units by 1988 from 8.3 million units in 1985. Housing starts will also be on a slowly declining trend to 1.7 million units by 1988, although that level of starts is still higher than has been typical since 1977-1978. The relative strength in housing construction coupled with on-going strength in consumer spending should contribute to favorable levels of activity among appliance manufacturers. The highly volatile U.S. refiner's acquisition price for crude oil is expected to stabilize in the $16 to $17 per barrel range. At these levels there is limited incentive for U.S. petroleum producers for exploration, drilling and production. Therefore, energy markets are likely to remain weak. Demand for steel in conversion and containers and packaging markets should remain stable. Exhibit R is a summary of historical and forecast steel macroeconomic indicators.

This Plan assumes a labor settlement at USX in the near term.

Continued Steel Rationalizations

Worldwide excess steelmaking capacity is estimated to be over 200 million tons, about 30 million tons of which is in the U.S. As excess domestic steel industry capacity competes for volume, a continuation of recent steel industry trends is expected. Major mills will probably continue to de-integrate through spin-offs, ESOPs, sales of individual units to management or closings followed by reopenings under independent ownership. The formation of additional partnerships and joint ventures is likely. Mini mills will probably continue to expand both their

aggregate market share as well as their product line capabilities. Within this environment, prices are likely to continue to deteriorate with "list price" not being relevant. Long-term purchasing contracts are expected to become more common among end users, while growth of the service center segment (which generally purchases under shorter lead times) should slow, although the share of domestic shipments moving through these centers will probably remain at record high levels of 24% to 25%.

Macroeconomic Risks and Opportunities

The major macroeconomic risks that would represent a weaker than anticipated environment for steel are:

—Deeper than projected decline in sales of domestically produced automobiles.
—Stronger than expected disincentives from tax reforms.
—The possibility that the economy could slip into a recession.
—GM or other automaker strike.

The major macroeconomic opportunities that would represent a stronger than anticipated environment for steel are:

—Stronger than expected GNP growth.
—Idlings of capacity by other steelmakers.
—Favorable government policy initiatives.

LTVS Strategies

Overview

The Steel Group's overall goal during 1987 and 1988 will be to achieve profitability and a positive cash flow while identifying the optimal core around which it plans to restructure and reorganize. Cost reductions will continue to be aggressively pursued. Commercial (price) strategies implemented immediately after the filing were designed to *stabilize* commercial relationships as rapidly

as possible. During the plan period LTVS will not reduce prices in an attempt to increase market share. Rather, the group intends to maintain market share by being competitive in price with major competitors while attaining industry leadership in quality, productivity and service. Overall customer reaction to the reorganization process thus far indicates that no decline in commercial relationships should occur so long as LTV Steel's quality and service remain good and prices are competitive. Based on customer comments, LTVS anticipates no major customer defections.

Flat Rolled Strategy

The flat rolled products division intends to pursue its current strengths in the U.S. automotive and appliance markets where it already enjoys market leadership position. This strategy will involve maintaining the group's current leadership position at Japanese owned U.S. located auto plants, through quality and service and in coated products, primarily by capitalizing on L-S Electro Galvanizing (LSE). According to Ford Motor Company, LSE has had "the best startup" of any domestic electrogalvanizing line. Technical selling teams are being organized to support a strategy of increasing sales of higher value products to end user markets. Similarly, independent blankers will be selected and managed as an additional resource in promoting end user sales. In tin mill products where LTV Steel's market share has been growing, the programs already in place should continue to succeed and allow the flat rolled division to take advantage of competitors' problems and increase its participation via quality, service and competitive pricing. Focused capital spending in conjunction with these strategies will enable the flat rolled group to maintain its position as a low cost domestic producer which is competitive with most imports in the U.S. market and recognized as an industry leader in quality, service and delivery.

Bar Products Strategy

Bar products' overall strategy is to capitalize on its current position as the country's largest bar producer, recognized as one of the premium quality suppliers. With the recent idling of most of the Chicago plant, the bar products division combines 100% electric furnace melt with both bloom and billet continuous casting capability and top and bottom ingot pouring all at its Canton facility. Intense cost reduction in all areas has been, and will remain, bar's foundation strategy to generate positive cash flow. A dedicated bar management (which includes the commercial function) has been established and will be a key to building on quality and service reputations. LTV will minimize its bar-related capital spending in the Plan period. The bulk of this spending will be in support of the profitable, market leading special metals unit. Simultaneously with the previously mentioned efforts, opportunities for joint ventures or for the sale of other units will be explored.

Tubular Products Strategy

Tubular's Campbell seamless mill was recently idled and its inventories will be converted into cash. This world class mill has been adequately "mothballed" to allow for either a restart or an enhanced sales value, though either event is likely to occur beyond the time horizon of this plan. Intense cost reduction efforts will continue to enhance the competitiveness of remaining tubular units. The specialized sales force will continue using its technical capabilities to emphasize target account technical selling to OEM customers of the steel and tubes unit and to line pipe end user customers of the electric welded unit. Service will be used as the primary differentiating factor for sales of standard electric welded pipe and commodity type steel and tubes applications. This service will involve maintaining "the right inventory in the right place" to improve lead times and delivery performance.

Marketing Plan

Overview

This two year Plan reflects participation levels based largely on strategies already in place. Thus market shares for most products are projected to remain relatively close to 1986 mid-year levels.

Flat Rolled Share

Flat rolled share (excluding tin) is expected to be 17.2%, only a slight increase from the 1985 level of 16.9%. This increase should occur in cold rolled and galvanized sheet steel, high margin product areas. Volume for the new electrogalvanizing line is viewed not as incremental but as a substitute for current cold rolled or hot dip galvanized volume. Tin mill products at LTVS have enjoyed a fairly steady increase in industry participation level, increasing from the 13% range in early 1985 to 15.2% for the full year 1985. Further increases to 17.5% in 1987 and 18.0% in 1988 are projected—higher than 1985 levels but consistent with the August 1986 year-to-date participation level of 17.5%.

Bar Share

Bar participation (excluding structural products) is forecast at 13.2%. Slight changes in mix are forecast based on recent facilities idlings and LTV Steel's strategy of emphasizing sales of higher value alloy products. Projected shares by product (compared to August 1986 year-to-date) are as follows:

	1987/1988 Projected Share	August 1986 Y-T-D Actual
Hot rolled bar	13.9%	13.8%
Cold finished bar	20.4	21.2
Wire	1.7	2.9
Stainless bar	7.6	5.8
Bar products	13.2%	15.0%
Structural products	3.4%	2.9%

Changes within each category also reflect a general upgrading of mix to a higher percentage of alloy product which carries higher profit margins.

Tubular Share

In tubular products, electric welded pipe should achieve shares of 18% in 1987 and 20.2% in 1988, higher than the 1985 level of 17.6%, but below August 1986 year-to-date participation of 22.9%.

Volume

Using the preceding market shares and projected level of industry shipments, LTVS anticipated volumes by major product line are as follows:

	Annual Volume (Tons in Thousands)		
	Forecast	Plan	
	1986 *	1987	1988
Flat Rolled (Including Tin and LSE)	7,395.0	7,072.8	7,017.4
Bar	1,407.0	1,247.4	1,269.0
Tubular	388.0	372.7	371.0
Specialty	70.0		
Total LTVS	9,260.0	8,692.9	8,657.4

* Eight months actual plus four months forecast.

The projected annual shipments of almost 8.7 million tons of steel translate into a total market share of 12.8% (including LSE) for both 1987 and 1988.

Prices

Steel industry prices are cyclical but have exhibited a downward trend for a number of years. As was explained earlier, steel prices are expected to fall further due to a weak environment, excess domestic and world capacity, short-term cash generation programs at financially stressed competitors and the growing presence of "reconstituted" mills (such as Gulf States Steel and Weirton) which are able to maintain lower cost struc-

tures than most of the industry primarily through lower employment costs.

In this plan, projected 1987 prices generally represent a 1% decline from actual prices in the third quarter of 1986. Prices are assumed to decline further by an additional 1% in 1988 as compared to 1987.

Facilities Plan for Continuing Operations

Overview

LTV Steel's clear intention is to reorganize around those units which can develop a sustainable competitive advantage permitting them to generate operating profits and positive cash flows. Within this context, business units have been tentatively identified as "primary," "supplementary" or "non-operating."

Primary units are those which are expected to use their sustainable competitive advantage to generate positive cash flow through the foreseeable future. As such, these represent the core units around which the group expects to reorganize.

Supplementary units are those which should not be idled yet, but whose projected cash flows are insufficient or too uncertain to be considered as primary at this time. Additional analysis is necessary to develop firm conclusions and recommendations about whether and how these units could be made strong enough to be considered primary or whether and how some other disposition should be sought. The resolution of the supplementary units is a fundamental goal of the LTV Steel Group.

Non-operating units are those units which have been idled and are being prepared for disposition.

The following is a summary of the company's primary, supplementary and non-operating units:

Division	Primary	Supplementary	Non-Operating
Flat Rolled:	Indiana Harbor Hennepin Cleveland Tin (2 plants) Coke plants Ore and Lime Railroads	Warren Drainage Products (6 plants)	Pittsburgh Primary Thomas Coke 6 Coal Properties
Bar:	Canton Massillon CF Beaver Falls CF Gary CF Special Metals	Chicago 11" Mill Chicago Wire Mill Willimantic CF Aliquippa 14" Mill	Aliquippa Primary/ Coke Buffalo/Donner-Hanna Pittsburgh Bar Mills Chicago (balance) Remaining CF Plants
Tubular:	Steel & Tubes (5 plants)	Youngstown ERW Counce ERW	Campbell I.H. Seamless Chicago Seamless Aliquippa Seamless Aliquippa Welded Youngstown CSR

A paramount goal of the LTV Steel Group is stemming negative cash flows from non-operating units. The costs associated with the non-operating units fall primarily into two categories:

1) Costs of holding idle facilities (including taxes, utilities, environmental, security, etc.).
2) Costs of payments to terminated employees formerly employed by the idle units.

A newly established Asset Management Group under the direction of a General Manager has been formed to deal specifically with non-operating units. Responsibilities of this group include identifying, prioritizing and analyzing ways to maximize cash flows from non-operating units.

Flat Rolled Units

The flat rolled products division will build its future around its primary units. Indiana Harbor will require

two blast furnaces (H-3 and H-4) to be relined within the plan period to support planned output from the continuous caster of 305,000 tons per month. The H-4 reline, which has already been approved and started, will be completed in 1987. Cleveland requires one reline (C-6) within the period which, with currently operating blast furnaces, support the planned output from the Cleveland Plant of 225,000 tons per month through its continuous caster. "Variable" capacity will be supplied through ingots poured from the Cleveland East and West basic oxygen furnaces and the Cleveland West electric furnaces. Iron ore will be supplied from Empire, Erie and Northwest. Substantially all coal will be purchased on the open market (and consequently BCNR, Beatrice, Beckley, Nemacolin, Olga and Tuscaloosa are reflected as non-operating units).

Though the Warren plant has several attractive specialty product lines (e.g., terne and silicon steel) which currently generate attractive margins and occupies a favorable niche as a producer of high carbon and alloy steels, its future is clouded by capital needs for a blast furnace reline in mid-1988, generally aged equipment and small coil size. Sustainable competitive advantage and favorable cash flows for the plant are not certain and it is therefore considered a supplementary unit whose future must still be resolved. This Plan presumes that the blast furnace is not relined and that Warren steelmaking is idled in mid-1988, although finishing operations continue through the end of the forecast period. A decision to reline this furnace would have to be made by mid-1987.

Bar and Tubular Units

Relatively little in the way of changes in current operating configuration is anticipated for bar or tubular products. All units currently operating are projected to continue through the Plan period, although additional

analysis will be undertaken to develop final conclusions and recommendations concerning supplementary units.

Facilities Summary

A summary of the Steel Group's expected steelmaking configuration follows:

Coke: Coke operations will function at capacity from currently operable facilities at Chicago, Cleveland, Pittsburgh and Warren throughout the period. However, two of Pittsburgh's five available batteries will expire by early 1988 and three of Cleveland's five available batteries will expire by year-end 1988. Even with these reductions, LTVS will be self-sufficient in coke throughout the period with no outside purchases or sales planned. Generally, coke inventory will be maintained at a 30-day supply.

Coal: An LTVS strategy is to exit the coal business. All LTVS wholly-owned and jointly-owned coal properties are assumed idle throughout the plan period except for Beckley Coal and Olga Coal. LTVS' 50% interest in Beckley Coal is assumed sold prior to January 1, 1987 while Olga Coal, of which LTVS owns 53%, is assumed to be shutdown during the Plan period. The balance of LTVS' coal requirements is assumed sourced from third parties at market prices. Currently and in the plan, almost all of LTVS' coal requirements are being satisfied from third parties at spot market prices. No contracts beyond one-year duration are planned.

Ironmaking: The flat rolled operations reflect a six-blast-furnace operation throughout 1987 reduced to a four-blast-furnace operation by year-end 1988. Cleveland will reduce from three to two and the Warren blast furnace is assumed not to be relined. Indiana Harbor will maintain a two-blast-furnace configuration throughout the period but will switch from H-1 and H-3 to H-3 and H-4 with the reline of H-4. Prior to the H-4 start-up in mid-

1987, purchased hot metal at the rate of 750 net tons of hot metal (NTHM) per day will supplement Indiana Harbor's iron requirement. The bar operations at LTVS will produce their raw steel requirement entirely from electric furnace production supplemented by steel purchases as required. Accordingly, no blast furnaces will operate in support of the bar business.

Ore: Requirements will be sourced from LTVS wholly-owned mines at Erie and Northwest Ore as well as from Empire, a joint venture in which LTVS is a 35% participant. Generally, Empire Ore will be used at Indiana Harbor and Erie Ore will be used at Cleveland and Warren. The output of Northwest Ore is scheduled as crude ore feed for Indiana Harbor's sinter plant. In 1987, Erie is expected to produce 6.4 million gross tons of iron ore pellets or at 80% of its capacity, while Empire will produce 8.0 million gross tons of iron ore pellets or at 100% of its capacity with LTVS taking 2.8 million gross tons. No pellets will be purchased during the Plan period.

Steelmaking: Basic oxygen furnaces will operate at Cleveland and Indiana Harbor throughout the Plan period and at Warren as long as iron production is available. Chicago's Q-BOP will remain idled. Cleveland's electric furnaces will operate throughout 1987-1988 except for the last half of 1987 because of anticipated slack market demand. Canton's electric furnaces will operate throughout the period. Pittsburgh's and Chicago's electric furnace shops will remain idled during this time frame.

Casters: By the 4th quarter 1987, Cleveland's caster will produce at the rate of 225,000 net tons per month and it will essentially maintain that performance thereafter. At Indiana Harbor, the caster will average 272,000 net tons per month in 1987 and 275,000 net tons per month in 1988. Production at Indiana Harbor peaks at 300,000 net tons per month in late 1988 reflecting increased caster

capacity resulting from the ladle metallurgy station capital expenditure. By late 1988, LTVS flat rolled operations will produce about 90% of its product from continuously cast slabs.

Capital Plan

Summary

The Steel Group's expenditures are considered necessary since LTVS had previously postponed a number of important projects in order to conserve cash. Capital spending averaged $480 million per year from 1979 through 1984, but was drastically reduced to an average of only $121 million per year in 1985 and 1986. Capital projects fall primarily into one of two categories: 1) those projects necessary to maintain operations and 2) those projects necessary to remain competitive and reduce costs. The proposed plan is consistent with the industry environment and LTVS strategies previously described. All expenditures are vital, either because of rapid cash paybacks or because customers have indicated that without these outlays LTVS will experience a loss of participation.

Projected capital expenditures are $282.3 million in 1987 and $230.0 million in 1988 (including rolls, capitalized interest and spending at consolidated subsidiaries).

Flat Rolled Capital

Capital spending for flat rolled represents $267.1 million in 1987 and $218.2 million in 1988 or almost 95% of total spending in each year. Capital spending for flat rolled is designed to:

—maximize cast slab production with four blast furnaces;

—meet market demands for improved flat rolled gauge tolerance;

—meet market demands for lower carbon steels with improved formability and more consistent properties;

—reduce operating costs; and

—meet environmental requirements.

Major projects include three blast furnace relines at Cleveland and Indiana Harbor (H-3, C-6 and the previously approved H-4), ladle metallurgy/vacuum degassing at Indiana Harbor, gauge control improvements at Cleveland and Indiana Harbor, galvanizing line improvements at Indiana Harbor and chrome plating (TFS) capability at Aliquippa tin.

The three blast furnace relines are necessary to maintain productive capacity at three of the four furnaces considered as the core of LTV Steel's future operations. The reline of C-6 will include an increase in its capacity to 4,000 tons per day utilizing fluxed pellets to maximize iron production in the four blast furnace mode (rather than five furnaces) in 1989. Total blast furnace spending in the two year plan period is $177.2 million.

Installation of ladle metallurgy/vacuum degassing at Indiana Harbor ($76.0 million) represents both a market driven and a cost reduction project that returns significant annual benefits. This project would be the first at any LTV facility and provide ultra low carbon sheet steel by ladle metallurgy/vacuum degassing, a common technology found in both Europe and Japan. Weirton Steel and Armco Steel's Middletown plant have ladle metallurgy/vacuum degassing facilities and Inland Steel is scheduled to bring their facility on stream in April 1987. In addition, both National and U.S.S. have ladle furnaces with the potential for retrofitting ladle metallurgy/vacuum degassing capability. The project provides Indiana Harbor with the ability to remain competitive in the production of extra clean deep drawing galvanized steels as well as electrical steels. Both are consistent with the strategies of remaining a leader in the automotive market, of supplying Japanese companies located in the U.S. and of emphasizing higher value products for

end users. The project results in continuous caster capacity increasing to 305,000 tons per month from 270,000 tons per month without any changes to the caster itself, thereby generating significant cost reductions.

Gauge control improvements planned for Cleveland and Indiana Harbor are required for LTVS to meet tightened automotive specifications for steels suitable for new high speed press lines. The $56.8 million expenditure, which represents most of the first phase of a longer term program lasting approximately through 1990, will provide gauge tolerances of ±1% at cold rolled sheet center line through 98% of the coil length. LTVS currently lags both domestic and international competitors in developing this capability which is absolutely necessary to remain a leading supplier to the automotive market. General Motors has required that these new restricted gauge tolerance specifications be available on steel provided for the 1988 model year. Most of LTV Steel's North American competitors have modernized their rolling facilities to meet these new requirements, thus threatening the group's position in the automotive market. In addition, Japanese and European steel companies have improved gauge and shape control methods which surpass any domestic producer's current capability.

Spending of $8.9 million at the Indiana Harbor #2 galvanizing line returns annual benefits of $13 million by increasing capacity 6,000 tons per month of over 60 inch wide material and eliminating the need for preanneal and pre-temper of exposed automotive drawing steel. Again, this project directly supports the strategy of maintaining a sustainable competitive advantage as a leading supplier of high value automotive steels.

Aliquippa tin lacks a facility to apply chromate coating (TFS) to tin mill products. Changes in market demand indicate the need for this capability to preserve participation at key accounts and to increase sales to sanitary can

producers by 9,400 tons per month. An expenditure of $9.5 million is projected to generate annual benefits of $12.5 million by 1989.

Bar and Tubular Capital

Capital spending for bar products totals $14.0 million in 1987 and $10.6 million in 1988. The program represents minimal spending to reduce costs at Canton and contains only one major project, an $8.1 million improvement to the mechanical forge press at the special metals unit. Special metals represents a "model" business unit in that it currently uses its acknowledged quality leadership to enjoy a commanding market share in a business area relatively free from imports and mini mills, which results in on-going positive cash flow. Protecting its competitive advantage through this expenditure will allow maintenance of market share as well as yield improvements and force reductions, generating annual benefits of $6.9 million.

Capital spending for tubular totals $1.2 million in both 1987 and 1988 and focuses primarily on complying with environmental requirements.

Financial Results

Assumptions

The 1987-1988 Plan results are based largely on a continuation of basic competitive strategies adopted immediately after filing for reorganization. The Plan represents a base from which the Steel group expects to improve through the development and implementation of strategic actions. The major assumptions incorporated into the Plan are summarized as follows:

—*Shipment levels*—1987 and 1988 industry shipments are estimated at 67.9 million tons. LTV Steel Group shipments are projected at 8.7 million tons in both periods or 12.8% of the market.

—*Selling prices*—1987 Plan prices generally represent a 1% decline from actual prices in the third quarter of 1986. Prices are assumed to further decline an additional 1% in 1988 from 1987 levels.

—*Facilities operations*—Relatively little in the way of change for bar or tubular products is projected. All units currently operating are projected to continue through the Plan period. Flat rolled products' Warren facility requires a blast furnace reline in mid-1988. This Plan presumes that the blast furnace is not relined and that Warren steelmaking is idled in mid-1988, although finishing operations continue through the end of the forecast period.

—*Capital spending*—Projected at $282.3 million in 1987 and $230.0 million in 1988, of which approximately 95% in both periods is for the flat rolled division.

—*Cost*—Certain benefits in the form of cost reductions generated thus far in the reorganization process have been included in the income and cash flow projections. These total approximately $25 million per month and include avoidance of executory contracts, non-accrual and non-payment of past service pension expense and reduced raw material costs. Projected costs *not* impacted by the filing represent an extrapolation of a recent historical period. Therefore, these costs are considered a proven, achievable base from which improvements are expected, although such improvements are not included in the Plan.

A number of other assumptions support the financial expression of the Plan. End-of-period balances for trade accounts receivable reflect 47 to 50 days of sales dollars. Post-petition accounts payable reflect roughly three weeks of trade credit and are assumed constant throughout the Plan. Normal payments and accruals are assumed for

payroll and sales and use taxes. In 1987, the Plan assumes normal accruals, but *no payments* for real estate, personal property and franchise taxes except for $20 million in the third quarter reflective of post-petition liabilities. In 1988, the Plan assumes normal accruals and payments for real estate, personal property and franchise taxes estimated at $50 million. Accident compensation accruals and payments are planned to continue on a normal basis for Ohio, Indiana and Illinois and for Federal Longshore workers where LTVS remains self-insured. Payments in all other states are a function of state insurance or private fund premiums.

No provision has been made for claims that may be entered with respect to the rejection of leases or executory contracts. As a debtor-in-possession, LTV Steel has the right, subject to bankruptcy court approval and certain other limitations, to assume or reject certain executory contracts and unexpired leases. Rejected executory contracts or unexpired leases are subject to a claim for damages for the breach thereof. It is not possible to quantify the amount of such claims at this time, and therefore, no provision has been made.

It is assumed that salaried defined pension contributions and pension costs for entities not filed under Chapter 11 are unaffected. The hourly current service pension is being accrued and is assumed paid in the amount of $21 million. Retiree insurance reflects current coverage with a cost of $92 million in 1987 and $104 million in 1988. Hourly payroll and benefit costs reflect approximately 38 million man hours (including steelworkers, mine workers, railroads, etc.) based on the current labor agreements. A $31 million profit sharing payment is assumed in April 1988 under the USWA Agreement.

1987 Net Sales (Exhibit O)

The Steel Group's 1987 annual operating plan is based on domestic industry shipments of 67.9 million tons, a

decrease of 1.8 million tons (3%) from the 1986 forecast of 69.7 million tons. The expected decrease in shipments is primarily due to the decreasing apparent domestic demand. While President Reagan's VRA Program has been effective in reducing import penetration from a six-month high of 29.3% in the last half of 1984 to an estimated 23% for 1986, imports are still significantly higher than the program's goal of 20.2%. Imports are expected to decline proportionately with U.S. mill shipments in 1987, remaining at 23% of apparent domestic demand.

1987 Steel Group sales are expected to decline $299.1 million from the 1986 forecast sales of $4.4 billion to $4.1 billion as shipments decrease 567,000 tons (6%) to 8,693,000 tons. Selling prices are expected to decline approximately 1% as the steel industry continues to experience excess capacity, high imports and declining consumption.

1987 Operating Income (Exhibit O)

The 1987 operating income is projected at $267.9 million. The flat rolled primary operations are the principal source of the operating income in 1987. Primary bar, tubular and LSE operating incomes are also contributors. Total Chapter 11 savings in the form of reduced costs have been estimated at approximately $25 million per month at the planned operating level. These savings and their estimated monthly value include:

	($ Millions)	
	Monthly	Annualized
Past Service Pension	$ 9.6	
Duquesne Light Contract	1.1	
Armco Coke Contract	1.6	
Reduced Coal and Ore Costs	12.5	
Total Operating Income Savings	$24.8	$297.6

Of the total Chapter 11 operating income improvements, it is estimated that over $200 million is reflected in the flat rolled primary operations in 1987.

1987 Cash Flow (Exhibits J & M)

Exhibits I through N present summary "legal entity" financial statements for the major entities which comprise the Steel Group. The cash flow before intercompany transfers for LTV Steel Company, Inc. is projected at $270.4 million for 1987. Cash flow for LTV Steel Tubular Products Company is expected to amount to $0.2 million.

The principal cash flow stems from the operating income plus depreciation of LTV Steel Company, Inc. less the capital expenditures needed to allow the Steel Group to remain competitive.

Interest expense is shown net of interest income.

Operating cash flows have been summarized in Exhibits S and T by the Primary, Supplementary and Non-operating units as discussed in the facilities overview.

1988 Operating Plan

The 1988 operating plan nearly mirrors the 1987 plan. Industry shipments are expected to remain at 67.9 million tons with the Steel Group maintaining a 12.8% share of the market with shipments of 8.7 million tons. Selling prices and resultant sales revenue are expected to decline slightly as domestic competition continues. The Steel Group's 1988 operating income is forecast at $251.9 million, a slight decline from the 1987 Plan operating income of $267.9 due primarily to the anticipated selling price deterioration.

The 1988 Plan reflects LTV Steel Company, Inc. cash flow of $234.5 million while sustaining a capital program of $228.8 million. LTV Steel Tubular Products Company is expected to generate negative cash flow of $9.0 million in 1988 with capital spending projected at $1.2 million.

Major Risks and Opportunities

Conditions that could result in a weaker or stronger than anticipated steel industry environment were discussed

earlier. Occurrence of any of these would likely manifest itself as increased or decreased volume and/or prices for LTVS. The financial projections in this Plan are extremely sensitive to both volume and price, a reality that is generally characteristic for any participant in the steel industry. Some very basic sensitivity analyses reveal the following upside/downside risks of the Plan to volume and price:

—a 1% change in average selling price generates approximately a $41 million change in operating income.

—a 1% change in volume from forecast shipment levels generates a change in operating income in the range of $8-$11 million depending on such factors as product mix, plants affected and timing of reductions.

Perhaps the most likely downside risk is a lower than expected auto build. With automotive the largest steel consuming market and LTVS the leading supplier to that market, LTV Steel's sensitivity to changes from forecast automotive levels is greater than that of other companies in terms of absolute volume.

—a 10% change in the level of auto build would induce a 1.8% change in the level of domestic steel industry shipments.

—a 10% change in the level of auto build would induce a 3.1% change in the level of LTVS shipments.

Thus a reduction of 780,000 units in 1987 auto build would likely reduce industry shipments 1.24 million tons and LTVS shipments 266,000 tons.

There are other risks and opportunities which continue to exist for LTVS. These are listed here in order to identify those factors which could influence projected financial performance.

Among the items with *upside potential* are:

—*Cost reductions*—A number of on-going programs could provide benefits in excess of those contained in the plan. These include "greenfield manning", yield improvements and increased direct rolling/hot charging.

—*Marketing programs*—A variety of programs could improve mix and/or increase market shares beyond levels in the plan. Chief among these is the recent establishment of a separate bar sales force.

—*Asset dispositions*—Although a group has been formed to deal with the non-operating units, none are forecast to be disposed of during the Plan period. Disposition of these units could reduce cash outflow and generate cash.

Additional *downside potential* exists regarding:

—*Increased imports by countries not covered* by the President's VRA Program—This along with the continued increase in *indirect* imports could cause lower industry volume and higher price concessions.

—*Unexpected work stoppages*—Any work stoppage at LTVS plants associated with or as a result of current labor negotiations or other circumstances would have a detrimental impact on financial performance.

—*Potential costs* associated with current retiree benefits which would not be covered by the PBGC in the event of pension plan termination.

—*Loss of key management*—Retention of highly skilled management represents a key need for LTVS.

In the event of weaker than expected industry environment leading to a lower than planned level of LTVS ship-

ments, the steel group's response would be scaled to the shortfall actually experienced. In flat rolled operations, downside response could be to:

—reduce output from most variable capacity—electric furnace teemed ingots at Cleveland West;

—idle Warren steelmaking sooner than contemplated in this Plan; or

—reduce output from remaining facilities by scaling back operations at other blast furnaces and basic oxygen melt shops.

Bar and tubular operations are quite flexible and output can be adjusted readily in response to changing industry conditions. In the event of stronger than expected industry conditions, LTV Steel's response would likely be to seek to improve financial performance by continuing to upgrade mix and attempting to increase price realizations in all product lines.

EXHIBIT I

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL COMPANY, INC. NET SALES & INCOME
($ Millions)

	Forecast 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
SALES	$ 4,138.4	$1,038.3	$1,031.0	$957.0	$926.6	$3,952.9	$3,891.2
OPERATING INCOME	$ 18.2	$ 61.9	$ 74.5	$ 58.0	$ 57.8	$ 252.2	$ 236.8
Interest Income/(Exp.) and Other (net)	(116.8)	(4.3)	(3.7)	(2.5)	(2.0)	(12.5)	$ (3.5)
Income/(Loss) Before Special Charge & Taxes	(98.6)	57.6	70.8	55.5	55.8	239.7	233.3
Special Charges	(2,129.5)	—	—	—	—	—	—
Income Taxes Credit/(Charge)	9.2	(0.3)	(0.3)	(0.3)	(0.3)	(1.2)	(1.2)
Net Income/(Loss)	$(2,218.9)	$ 57.3	$ 70.5	$ 55.2	$ 55.5	$ 238.5	$ 232.1
KEY STATISTICS							
Operating Income Return on Sales	0.4%	6.0%	7.2%	6.1%	6.2%	6.4%	6.1%
— Per NT Shipments	$ 2	$ 28	$ 34	$ 29	$ 30	$ 30	$ 29
Shipments — (000) NT	8,876	2,198	2,169	2,010	1,943	8,320	8,286

EXHIBIT J

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL COMPANY, INC. CASH FLOW
($ Millions)

	Operating Plan	
	1987	1988
SOURCE OF CASH		
Net Income	$238.5	$232.1
Depreciation	195.7	195.8
Working Capital (Excluding Cash, Debt and Intercompany Items)	137.0	52.7
Total	571.2	480.6
USES OF CASH		
Capital Expenditures	281.1	228.8
Other	19.7	17.3
Total	300.8	246.1
Net Sources of Cash Before Intercompany Transfers	270.4	234.5
Transfers To LTV	(270.4)	(234.5)
Net Changes in Cash Position	$—	$—

EXHIBIT K

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL COMPANY, INC. SUMMARY OF FINANCIAL POSITION
($ Millions)

	Forecast	Operating Plan	
	12/31/86	12/31/87	12/31/88
CURRENT ASSETS			
Cash and Short-term Securities	$ (0.8)	$ (0.8)	$ (0.8)
Receivables (net of Sales to LTV Sales Finance)	171.4	101.7	91.5
Intercompany Accounts (net)	288.4	558.8	793.3
Inventories (net of LIFO Reserves)	732.4	706.2	634.4
Other Current Assets	19.6	19.6	19.6
Total	1,211.0	1,385.5	1,538.0
CURRENT LIABILITIES			
Accounts Payable	127.7	129.6	98.0
Pre-Petition Current	61.7	30.6	30.6
Other Accrued Liabilities	236.2	306.5	308.8
Total Current Liabilities	425.6	466.7	437.4
WORKING CAPITAL	785.4	918.8	1,100.6
NONCURRENT ASSETS			
Property, Plant & Equipment (net)	2,415.7	2,497.4	2,526.8
Investments and Other Noncurrent Assets	132.3	123.5	115.2
Total Assets Less Current Liabilities	3,333.4	3,539.7	3,742.6
LESS NONCURRENT LIABILITIES			
Plant Closing Reserve	233.0	177.9	131.4
Minority Interest and Other	161.4	184.3	201.6
Pre-Petition Deferred	4,149.7	4,149.7	4,149.7
Total Noncurrent Liabilities	4,544.1	4,511.9	4,482.7
SHAREHOLDER'S DEFICIENCY	$(1,210.7)	$ (972.2)	$ (740.1)

EXHIBIT L

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL TUBULAR PRODUCTS COMPANY NET SALES & INCOME
($ Millions)

	Forecast 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
SALES	$ 329.9	$54.3	$51.7	$47.9	$47.5	$201.4	$207.4
OPERATING INCOME/ (LOSS)	$ (22.2)	$ 2.2	$ 2.5	$ 1.8	$ 1.8	$ 8.3	$ 8.0
Interest Income/(Exp.) and Other (net)	(14.2)	0.4	0.6	0.5	0.4	1.9	0.5
Income/(Loss) Before Special Charge & Taxes	(36.4)	2.6	3.1	2.3	2.2	10.2	8.5
Special Charge	(89.4)	—	—	—	—	—	—
Income Taxes Charge	0.1	—	—	—	—	—	—
Net Income/(Loss)	$(125.7)	$ 2.6	$ 3.1	$ 2.3	$ 2.2	$ 10.2	$ 8.5
KEY STATISTICS							
Operating Income							
Return on Sales	(6.7)%	4.1%	4.8%	3.8%	3.8%	4.1%	3.9%
— Per NT Shipments	$ (58)	$ 19	$27	$22	$22	$ 22	$ 22
Shipments — (000) NT	384	116	91	83	83	373	371

EXHIBIT M

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL TUBULAR PRODUCTS COMPANY CASH FLOW
($ Millions)

	Operating Plan 1987	1988
SOURCES OF CASH		
Net Income	$10.2	$ 8.5
Depreciation	1.7	1.6
Working Capital (Excluding Cash, Debt and Intercompany Items)	13.4	(10.1)
Total	25.3	—
USES OF CASH		
Capital Expenditures	1.2	1.2
Other	23.9	7.8
Total	25.1	9.0
Net Sources/(Uses) of Cash Before Intercompany Transfers	0.2	(9.0)
Transfers (To)/From LTV	—	9.0
Net Increase in Cash Position	$ 0.2	$ —

EXHIBIT N

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL TUBULAR PRODUCTS COMPANY SUMMARY OF FINANCIAL POSITION
($ Millions)

	Forecast 12/31/86	Operating Plan 12/31/87	12/31/88
CURRENT ASSETS			
Cash and Short-term Securities	$ 0.8	$ 1.0	$ 1.0
Receivables (net)	(2.7)	(2.7)	(2.7)
Intercompany Accounts (net)	(13.5)	(13.5)	(22.5)
Inventories	56.8	41.5	40.5
Other Current Assets	0.2	0.2	0.2
Total	41.6	26.5	16.5
CURRENT LIABILITIES			
Accounts Payable	3.1	5.1	5.1
Other Accrued Liabilities	41.2	37.3	26.2
Total Current Liabilities	44.3	42.4	31.3
WORKING CAPITAL (DEFICIENCY)	(2.7)	(15.9)	(14.8)
NONCURRENT ASSETS			
Property, Plant & Equipment (net)	4.7	5.9	7.1
Investments and Other Noncurrent Assets	97.5	105.5	112.5
Total Assets Less Current Liabilities	99.5	95.5	104.8
LESS NONCURRENT LIABILITIES			
Plant Closing Reserve	15.0	—	—
Minority Interest and Other	0.6	1.4	2.2
Pre-Petition Deferred	153.9	153.9	153.9
Total Noncurrent Liabilities	169.5	155.3	156.1
SHAREHOLDER'S DEFICIENCY	$(70.0)	$(59.8)	$(51.3)

EXHIBIT O

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL GROUP NET SALES & OPERATING INCOME
($ Millions)

	Forecast 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
SALES							
LTV Steel Co., Inc	$4,138.4	$1,038.3	$1,031.0	$957.0	$926.6	$3,952.9	$3,891.2
LTV Steel Tubular Products Co.	329.9	54.3	51.7	47.9	47.5	201.4	207.4
L-S Electro Galvanizing	58.9	47.0	53.5	54.6	52.8	207.9	225.6
LTV Holdings (Including Storage & Reomar Shipping)	26.5	—	—	—	—	—	—
Eliminations & Adjustments	(129.9)	(51.2)	(61.2)	(63.4)	(61.7)	(237.5)	(244.4)
Total Steel Operations	$4,423.8	$1,088.4	$1,075.0	$996.1	$965.2	$4,124.7	$4,079.8

[EXHIBIT O, Continued]

	Forecast 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
OPERATING INCOME/ (LOSS)							
LTV Steel Co., Inc.	$ 18.2	$ 61.9	$ 74.5	$ 58.0	$ 57.8	$ 252.2	$ 236.8
LTV Steel Tubular Products Co.	(22.2)	2.2	2.5	1.8	1.8	8.3	8.0
Empire Ore Mining Company *	4.6	—	—	—	—	—	—
L-S Electro Galvanizing	(3.3)	1.8	2.6	1.9	1.1	7.4	7.1
LTV Holdings (Including Storage & Reomar Shipping)	(1.4)	—	—	—	—	—	—
Adjustments	3.8	—	—	—	—	—	—
Total Steel Optn's	$ (0.3)	$ 65.9	$ 79.6	$ 61.7	$ 60.7	$ 267.9	$ 251.9
KEY STATISTICS							
Return on Sales	—	6.1%	7.4%	6.2%	6.3%	6.5%	6.2%
—Per NT Shipments	$ —	$ 28	$ 35	$ 29	$ 30	$ 31	$ 29
Shipments—(000) NT	9,260 **	2,314	2,259	2,094	2,026	8,693	8,657
Market Share	13.3%	12.8%	12.8%	12.8%	12.8%	12.8%	12.8%

* Merged into LTV Steel in early 1986.

** Revised from October 1986 forecast to include 1986 shipments of Specialty Products prior to divestiture.

EXHIBIT P

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL GROUP OPERATING PLAN
(000 Net Tons)

	Forecast 1986	Operating Plan 1987	1988
SHIPMENTS	9,260.0	8,692.9	8,657.4
RAW STEEL PRODUCTION			
BOF/QBOP—Cleveland	4,091	3,854	3,756
—Indiana Harbor	3,359	3,291	3,438
—Warren	1,362	1,237	646
—Chicago *	112	—	—
Electric—Cleveland	592	320	768
—Midland **	100	—	—
—Canton	1,167	1,364	1,393
—Chicago *	363	—	—
Total Steel Production	11,146	10,066	10,001
CONTINUOUS CAST STEEL			
Indiana Harbor	3,239	3,261	3,305
Cleveland	2,250	2,462	2,657
Canton	326	411	412
Total Cast Steel	5,815	6,134	6,374
HOT METAL PRODUCTION			
Cleveland	3,446	3,296	3,148
Indiana Harbor	2,661	2,788	2,745
Warren	1,150	1,044	543
Chicago *	165	—	—
Total Hot Metal Production	7,422	7,128	6,436
COKE PRODUCTION	3,548	3,774	3,326

* Idled in 1986.

** Sold in April 1986.

EXHIBIT Q

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

FORECASTS OF DOMESTIC STEEL SHIPMENTS
AS OF 11/10/86
(TONS IN MILLIONS)

	1987	1988
LTV STEEL	67.9	67.9
CHASE ECONOMETRICS	71	71.5
DRI	67.9	71
SALEM GROUP	70	73
ARMCO	63	—
BETHLEHEM	70	73
INLAND	72	73
NATIONAL	63	—
USX	65	—
WEIRTON	74	—
FIRST BOSTON	67	70
GOLDMAN SACHS	68.5	62
KIDDER PEABODY	69.5	—
MELLON BANK	68.9	—
MERRILL LYNCH	70	68.5
OPPENHEIMER	64	—
PAINE WEBBER	65	76.5

SOURCE: COMPANY PUBLICATIONS, INVESTMENT NEWSLETTERS, TELEPHONE INTERVIEWS.

EXHIBIT R

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL GROUP SUMMARY OF MACROECONOMIC INDICATORS

	ACTUAL			FORECAST		
	1983	1984	1985	1986	1987	1988
REAL G.N.P. GROWTH	3.5%	6.5%	2.2%	2.6%	2.7%	3.0%
G.N.P. DEFLATOR	3.7%	4.2%	3.3%	2.6%	2.5%	3.5%
PRIME RATE—AVERAGE	10.8%	12.0%	9.9%	8.4%	8.0%	7.7%
U.S. DOLLAR EXCHANGE RATE CHANGE	4.0%	7.2%	3.9%	(17.0)%	(3.6)%	0.7%
REFINERS' ACQ. PRICE OF CRUDE OIL ($/BARREL)	$29.01	$28.63	$26.75	$16.72	$16.00	$17-$18
INDUSTRIAL PRODUCTION INDEX (% CHANGE)	5.9%	11.6%	2.3%	0.5%	2.7%	3.1%
HOUSING STARTS (MM UNITS)	1.70	1.76	1.74	1.92	1.75	1.70
UNEMPLOYMENT RATE	9.6%	7.5%	7.2%	7.1%	6.9%	6.5%
CAR SALES (MM UNITS):						
DOMESTIC	6.8	8.0	8.3	7.9	7.8	7.6
FOREIGN	2.4	2.4	2.8	3.0	3.3	3.5
DEALER TRUCK DELIVERIES	3.2	4.2	4.8	4.6	4.7	4.8

Source: DRI and Company Projections

EXHIBIT S

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL GROUP 1987 OPERATING CASH FLOW
($ Millions)

	Primary	Supplementary	Non-Operating	Total
FLAT ROLLED	$326.6	$36.6	$ (5.4)	$357.8
COAL	—	—	(19.2)	(19.2)
BAR	30.9	(1.6)	(37.8)	(8.5)
TUBULAR	7.4	(6.2)	10.0	11.2
LSE	(0.6)	—	—	(0.6)
CORPORATE *	(90.4)	—	—	(90.4)
TOTAL	$273.9	$28.8	$(52.4)	$250.3

* PRIMARILY RETIREE INSURANCE.

EXHIBIT T

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV STEEL GROUP 1988 OPERATING CASH FLOW
($ Millions)

	Primary	Supplementary	Non-Operating	Total
FLAT ROLLED	$278.1	$59.5	$(5.2)	$332.4
COAL	—	—	(10.8)	(10.8)
BAR	27.3	(7.8)	(23.2)	(3.7)
TUBULAR	5.1	(2.8)	(8.0)	(5.7)
LSE	7.1	—	—	7.1
CORPORATE *	(102.4)	—	—	(102.4)
TOTAL	$215.2	$48.9	$(47.2)	$216.9

* PRIMARILY RETIREE INSURANCE.

AEROSPACE

THE LTV CORPORATION AND SUBSIDIARIES
1987-88 OPERATING PLAN

III. LTV AEROSPACE AND DEFENSE COMPANY

Introduction

LTV Aerospace and Defense Company is a premier military contractor and subcontractor and a supplier of medium to high technology aerospace structures. LTVAD recently restructured its organization to emphasize the difference in the markets in which it operates. The "new" LTVAD is now comprised of two major groups—LTV Aircraft Products Group (APG) and LTV Missiles and Electronics Group (M&EG).

The Aircraft Products Group (APG), formerly the Aero Products Division, consists of three new divisions: (1) Military Aircraft Division; (2) Commercial Aircraft Division; (3) Modernization and Support Division. The group is a major subcontractor to both military and commercial aircraft programs.

The Missiles and Electronics Group (M&EG) is comprised of the Missiles Division (MD), Sierra Research Division and AM General Division (AMG). The group is a prime military contractor for missiles, tactical wheeled vehicles and electronic components and systems.

LTVAD has overcome the major obstacles to its business presented by the Chapter 11 filing. With the assistance of the Bankruptcy Court, LTVAD has been able to assure its key suppliers and customers of its continuing ability to meet all of its cash, operating and manufacturing obligations. A major goal of LTVAD's operating plan presentation is to inform LTV's other constituencies of the possibilities for and requirements of these ongoing business needs.

Because of LTVAD's substantial backlog ($4.6 billion at June 30, 1986), the groups can predict their "base" sales

and profitability with reasonable accuracy. The challenge is to compete and win new major profitable contracts, such that the backlog will not only continue to increase but will also perpetuate positive growth into the years beyond this plan period.

Environment

Overview

During the 1980-86 timeframe, U.S. defense budgets have enjoyed substantial real growth; however, during the remainder of this decade it is predicted that the defense budgets will average real growth of -1.0 to -1.5 percent. This factor will obviously increase the market competitive pressures within the industry, pressures that will be further amplified by other forces, such as:

—Policies dictating a higher degree of recompetition and second sourcing.

—Regulation changes requiring a higher percentage of firm-fixed-price competition, as well as reduced levels of progress payments.

—Increased attempts to require defense contractors to invest in the upfront tooling costs for programs.

—Increased levels of competition from foreign sources.

While LTVAD will be subject to these market pressures along with the rest of the industry, there are several existing factors that should prove advantageous to LTVAD.

—The LTVAD backlog contains a well-balanced mixture of production programs and R&D programs, which will provide a stable return on sales.

—Most of LTVAD programs represent hardware and systems that fulfill a generally accepted military need, and have, in the past, been reasonably supported during the fiscal budget process. It is reasonable to predict, therefore, that these programs should be less likely to be candidates for cancellation, and at the worst suffer only from program stretch-out due to fiscal pressures.

—Several years ago LTVAD adopted a policy of being more willing to accept firm-fixed-price contracts in lieu of cost-plus contracts. Since that time, a major percentage of LTVAD's revenues and profits have been generated on a fixed-price basis. The experience gained in terms of total workforce philosophy, management control techniques and customer confidence should accrue as a distinct advantage to LTVAD in future competitions for and performance of contracts.

APG Environment

LTV's Aircraft Products Group serves both the military and commercial markets. During the 1984-1986 timeframe APG's revenues grew at a compounded annual rate of approximately 30%. This rate will not be sustainable during the forecast period as APG will be closing out production on one of its major programs, namely B-1 production. During the 1987-88 timeframe, the group will be tooling and facilitizing for major new programs that will be entering production between now and the end of this decade. Inherent in this production process is a temporary reduction in annual revenues, which will bottom-out in 1988 and return to a positive growth in 1989.

APG commercial programs will enjoy a period of modest growth during the next several years due to increased production rates of commercial aircraft.

M&EG Environment

The forecasted operating environment differs for each of M&EG's three divisions.

Because of its involvement with major complex strategic military programs, the M&EG's Missiles Division's markets appear relatively strong, despite the overall mediocre defense industry environment. MD is at the beginning or early stages of lead-in contracts, many of which could have production runs through the year 2000. These programs—including MLRS, ATACMS, ASAT and other missile programs—are broad-based and unlikely to be cut even as national defense spending is scaled back. International sales of the MLRS also appear a strong possibility.

AM General's market environment for the next two years will be tougher than M&EG's other divisions. During the forecast period, AMG is concluding a large production run of the Hummer which had numerous and well-publicized problems and which will not be profitable. The Congress has appeared lukewarm to the Army's plans for a new family of medium tactical wheeled vehicles, an area where AM General would be quite strong and competitive. Funding for this new program could move further to the out years. Loss of the M939 rebuy means that production on this vehicle could be phased out in late 1987.

International factors could be detrimental to AM General's predicted operating environment. The international markets—heretofore projected as a substantial opportunity for the division—are becoming more difficult to penetrate due to increased competition, the Third World debt burden, the oil market collapse (making sizeable wheeled military vehicle purchases by the affected countries unlikely) and other political forces. The international markets for commercial trucks are experiencing similar downturns:

—There is aggressive foreign entry into the world medium/heavy truck market by companies such as Hino, M.A.N., Isuzu, Mercedes, Volvo, Nissan, Mitsubishi and Iveco.

—Commercial medium/heavy truck manufacturers already have excess production capacity worldwide in a depressed market.

Sierra Research Division is the smallest division within the Missiles and Electronics Group, and as such, its contracts are smaller (in sales dollars) than the average contract within the group. Sierra Research has a wide diversity of government electronic contracts which should minimize the impact of major military or commercial budget reductions. Sierra Research will be operating in a favorable market environment during the next two years, which should offer substantial growth opportunities with a minimum of capital expenditures.

Strategies and Objectives

Summary

For the Plan period and beyond, LTVAD's summary strategy is to capitalize on its existing backlog of well-supported programs, and to sustain a positive growth rate during this period of reduced defense budgets. Integral to this strategy will be to continue to excel in terms of contract performance, such as to perpetuate a recognized reputation for satisfactory contract fulfillment, innovativeness in selected key technologies, and a willingness to invest in the technologies and facilities required for the execution of future programs. This summary strategy can be amplified as follows:

—APG to achieve modest growth in the manufacture of medium to high technology aerospace structures and to capitalize on the growth that will occur in the aircraft overhaul and modernization segment of the market.

—MD to profitably grow its existing surface-to-surface missile programs, and to rapidly expand into new market segments of air-to-air missiles.

—Continue to improve AMG's cost and quality performance on Hummer production, and to refine the organization's competitive structure for future military truck competitions, including the forthcoming Hummer rebuy.

—To sustain high near term growth rates at Sierra through the penetration into new major system and electronic warfare markets.

APG Strategy

The Aircraft Products Group's objective is to build upon its reputation as a premier supplier of aircraft structures. APG's strategy is to be a "team member" of aircraft prime contractor product teams and to invest in selective aerospace technologies where it has a competitive advantage, including manufacturing technology specialties, engineering expertise and test laboratory capability. Additionally, the group will selectively compete with traditional aircraft structure subcontractors in situations where its combination of low cost rates and manufacturing technology base appear to provide an overall competitive edge. APG also intends to concentrate its independent research and development on "high-profitability-win" opportunities and to make manufacturing technology the capital resources priority.

M&EG Strategy

Within M&EG, AM General's goal is to remain as a leading producer of tactical wheeled vehicles while continuing to improve profitability. AMG is curently the principal supplier of tactical wheeled vehicles and variants to the U.S. Army and believes that potential annual sales of such vehicles to the international market could be between $100 and $200 million. AMG's objectives for the Plan period include:

—successfully completing the Hummer contract,

—winning the Hummer rebuy,

—continuing 5-ton truck production through 1988,

—increasing international sales of the Hummer and 5-ton truck,

—continuing aggressive cost reduction program,

—winning the Family of Medium Tactical Vehicles ("FMTV") production contract when offered to the industry and

—pursuing the Family of Heavy Tactical Vehicles ("FHTV") program when offered to the industry.

M&EG's Missiles Division's emphasis during the next two years will be to capitalize on areas where it already has a lead-in program. The Company's major new business includes MLRS, ATACMS, ASAT, Hypervelocity Missile (HVM), Pedestal Mounted Stinger (PMS) and VT-1. Additional business opportunities exist in potential system variants, funded technology program evolution, subsystems development, leveraged technology development and international activities.

M&EG's Sierra Research's primary business elements and objectives for each are as follows: communication, command and navigation—to propagate current product lines and maintain high returns on sales; advanced technology programs—to position Sierra as a large systems contractor and integrator, thereby ensuring profitability; electronic warfare—to penetrate further the "EW" market and position Sierra as an "EW" house; and international activities—to sell current products overseas, possibly increasing sales through new product offerings or joint ventures.

Recent Awards

Among the awards LTVAD has received since the filing are the following:

DIVISION

Aircraft Products

Date Received	Award (Product)	Award ($ Millions)	Variant/ Follow-on Potential
09/86	DC-10 Horizontal Stabilizer	$ 3.5	$5.0 M
09/86	ANG—A-7 Video Management System Kits & Installation	$ 8.1	—
10/86	C-17 Empennage and Nacelles Pre-award Support	$ 5.2 (1)	$3.5 B (Total Years)
11/86	Boeing—150-747's 100-757's 100-767's	$22.0 (2)	Approx. $175 M to $200 M per year

(1) A contract in the amount of $182.5 million for the FSD phase of the C-17 program has been negotiated and is in the process of being executed by McDonnell Douglas.

(2) An agreement on price has been reached with Boeing for follow-on orders to existing contracts in the amount of $596.0 million. Orders are received and entered in backlog as incrementally released by Boeing.

Missiles & Electronics

Date Received	Award (Product)	Award ($ Millions)	Variant/ Follow-on Potential
11/86	Follow-on Hummer	$271.4	$1,700.0
11/86	5-Ton Trucks	3.4	600.0
11/86	Engineering Services	6.5	30.0
11/86	MLRS Rocket System Spares	4.3	100.0
11/86	MLRS Rocket Systems	229.0	2,300.0
11/86	Hummer GTE Communications	4.4	225.0
10-11/86	Flight Inspection & Station-keeping Equipment & Spares	12.8	500.0

Capital Plan

Overview

LTVAD is entering a period where significant capital investment is required. In large measure, these investments represent the fulfillment of contract commitments for programs entering their production phase. To a lesser degree, capital is required to rehabilitate and/or replace basic plant equipment that is experiencing low availability due to breakdown or has exceeded its useful life.

The Military Aircraft Division of the Aircraft Products Group and the Missiles Division of the Missiles and Electronics Group are the divisions requiring most capital during 1987 and 1988. Projected expenditures for AM General and Sierra Research are small, designed primarily to service existing contractual obligations and operational equipment/facilities.

APG Capital

The Plan identifies investment levels of $106 million in 1987 and $116 million in 1988 for capital equipment and facilities needed to support the Aircraft Products Group's contracts.

The major capital projects for APG during this Plan include the Flexible Composites Center (FCC) and the Integrated Machining Systems (IMS), both required to fulfill the contractual commitments of the ADP Program. The IMS project represents the design and installation of manufacturing equipment into existing facilities, while the FCC project represents the construction of a new 700,000 square foot facility and the installation of automated equipment necessary for the manufacture of advanced state-of-the-art composites. Both projects are scheduled for completion in 1989, with the current Plan calling for the FCC to be financed through a combination lease/ownership arrangement.

Other major projects during this time frame include a 74,000 square foot facility addition for ADP final assembly and a 40,000 square foot shipping facility that will service both the ADP and C-17 Programs.

M&EG Capital

Missiles and Electronics Group forecasts capital expenditures of $69 million and $70 million in 1987 and 1988, respectively. The major capital projects include facilitization for the ATACMS, MLRS, ASAT and Hummer Programs as well as expenditures to assure future growth by supporting continued research and development of longer-term technology.

Financial Results

1987 Net Sales (Exhibit U)

1987 planned net sales total $2,559 million, $94 million above the forecast 1986 level. Approximately 63% of the total will be provided by M&EG with the remaining 37% produced by APG.

LTV's Aircraft Products Group's 1987 sales are projected to be approximately $948 million, a decrease of $134 million from the 1986 projection primarily due to lower B-1B program sales and reduced sales on the ADP's program. Revenues from the completion of the B-1B fuselage shipments to Rockwell, Advanced Development Programs and Boeing aircraft component deliveries are the principal components of APG's forecast 1987 sales.

M&EG's sales are forecast to be $1,612 million for 1987. The principal components of this revenue include the delivery of over 19,000 Hummer units to the U.S. Government, the completion of the M939 5-ton truck program and substantial sales of wheeled vehicles to foreign customers (AMG); high volume monthly MLRS deliveries,

the start-up of the ATACMS program and the continuation of the ASAT program (Missiles Division); and sales of Radar Bomb Scoring Systems, LAMPS and Stationkeeping equipment (Sierra Research). M&EG's $228 million sales increase from 1986 projections is primarily due to an increase of $76 million in Hummer sales and increased foreign sales of 2½- and 5-ton trucks, which increases are partially offset by the decline of the M939 5-ton truck shipments (AMG); a $115 million increase due to MLRS rocket production and the continued buildup of the ATACMS program (Missiles Division); and an increase in Stationkeeping equipment sales and Systems Integration growth (Sierra Research).

Exhibits Y & BB provide greater detail of sales by major program category.

1987 Operating Income (Exhibit U)

LTVAD projected 1987 operating income totals $160 million, $43 million higher than the 1986 forecast level. M&EG accounts for approximately $81 million of this total, with the remainder provided by APG. 1987 operating income as a percentage of sales is projected at 6.0%, a favorable change relative to 1986. APG's projected operating income of $79 million is $21 million lower than the 1986 level due to lower B-1B and ADP's Program sales. M&EG's operating income increases approximately $64 million relative to 1986, primarily because of AMG's Hummer contract loss provision which was recorded in 1986 and higher sales of MLRS and ATACMS programs. Exhibits U, X and AA provide detail of these changes.

1987 Cash Flow (Exhibit V)

Planned 1987 net income of $159 million and depreciation of $31 million are partially offset by additions to working capital and property, resulting in $6 million of cash flow before intercompany transfers.

During 1987, LTVAD's working capital (including cash and intercompany accounts) is planned to increase by $58 million, to $385 million. This growth is primarily attributable to a net inventories increase of $61 million. $40 million of this increase is due to APG's support of higher production on the Boeing 747, ADP's and C-17 Programs. The remaining inventory increase results from a higher MLRS rocket rate production in M&EG's MD unit and higher rate Hummer production in M&EG's AMG unit.

1988 Operating Plan

Projected 1988 sales of $2,492 million represent a $67 million decline from the planned 1987 level. The APG sales reduction of $217 million is primarily due to the completion of the B-1B Program in 1987. M&EG's sales increase of aproximately $150 million, is due to all of its divisions projecting higher revenues. 1988 operating income follows a similar trend: the increase in M&EG's forecast operating income is slightly exceeded by the expected decrease in APG's operating income, resulting in an overall expected decrease in LTVAD's 1988 projected operating income relative to 1987. LTVAD's operating margin is projected to remain flat during this period.

LTVAD's 1988 projected firm funded ending backlog is $3.1 billion, including new orders of approximately $2.2 billion received during 1988, as detailed in Exhibit Z and CC.

LTVAD's projected 1988 net income of $161 million and depreciation of $35 million are partially offset by an increase in working capital and property additions, resulting in an cash flow before intercompany transfers of $80 million.

To summarize, 1988 reflects a slight decline in sales and income from 1987 with a substantial increase in cash generation.

Major Issues

The major challenge facing LTVAD during this Plan period is continuing to assure all customers that it can perform all its contracts and meet all its commitments. Equally important is to continue the investment of research and development funds necessary to insure the sustained and profitable growth of all the operating divisions.

The major issues for APG during this Plan period include:

—Successful technical and political maturing of the ADP Program.

—Continued budget support for the C-17 Program.

—Successful implementation of major capital projects.

—Negotiations with Boeing for a follow-on $600 million commercial order.

—Receiving a $100 million development contract in 1987 from the U.S. Air Force, to demonstrate the effectiveness of a modernized A-7 attack aircraft.

—Cultivating significant international follow-on orders from both Greece and Portugal for A-7's.

For M&EG, major issues in 1987 and 1988 include:

—Keeping Hummer production within its cost structure.

—Facilitization for the ATACMS program.

—Achieving a major MLRS international award.

—Achieving forecasted international sales at AMG.

EXHIBIT U

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN
($ Millions)

LTV AEROSPACE AND DEFENSE COMPANY NET SALES & OPERATING INCOME

	Fcst. 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3d Qtr.	4th Qtr.	Year	Plan 1988
NET SALES							
Missiles & Electronics Group	$1,382.8	$395.7	$374.8	$399.3	$441.8	$1,611.6	$1,761.1
Aircraft Products Group	1,081.9	248.5	257.9	221.7	219.5	947.6	730.7
Total	$2,464.7	$644.2	$632.7	$621.0	$661.3	$2,559.2	$2,491.8
OPERATING INCOME							
Missiles & Electronics Group	$ 17.7	$ 19.6	$ 17.5	$ 20.1	$ 23.7	$ 80.9	$ 96.2
Aircraft Products Group	99.7	20.8	21.8	19.5	16.8	78.9	61.1
Total	117.4	40.4	39.3	39.6	40.5	159.8	157.3
Interest Income/(Exp.) & Other (net)	(11.2)	0.3	(0.2)	(0.5)	(0.1)	(0.5)	3.3
Special Charge (a)	(140.1)	—	—	—	—	—	—
Net Income/(Loss)	$ (33.9)	$ 40.7	$ 39.1	$ 39.1	$ 40.4	$159.3	$160.6

(a) AMG Goodwill and Facilities Write-off

[EXHIBIT U, Continued]

KEY STATISTICS							
Return on Sales	4.8%	6.3%	6.2%	6.3%	6.1%	6.2%	6.4%
Net Assets Employed	$ 412	$ 485	$ 530	$ 593	$ 566	$ 566	$ 659
Orders	$ 2,462	$ 355	$ 862	$ 472	$ 793	$2,482	$2,202
Backlog (End of Period)							
Firm	3,443	$3,154	$3,383	$3,234	$3,366	$3,366	$3,076
Unfunded	615	588	288	286	23	23	—
Total	$ 4,058	$3,742	$3,671	$3,520	$3,389	$3,389	$3,076

EXHIBIT V

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY CASH FLOW
($ Millions)

	Operating Plan	
	1987	1988
SOURCES OF CASH		
Net Income	$159.3	$160.6
Depreciation	31.4	34.9
Working Capital (Excluding Cash and Intercompany Items)	(51.5)	(1.4)
Total	139.2	194.1
USES OF CASH		
Capital Expenditures	120.0	118.2
Other	13.0	(3.9)
Total	133.0	114.3
Net Sources of Cash Before Intercompany Transfers	6.2	79.8
Transfers (To)/From LTV	52.6	(34.7)
Net Increase in Cash Position	$ 58.8	$ 45.1

EXHIBIT W

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY SUMMARY OF FINANCIAL POSITION
($ Millions)

	Forecast	Operating Plan	
	12/31/86	12/31/87	12/31/88
CURRENT ASSETS			
Cash and Short-term Securities	$ 57.4	$116.2	$161.3
Receivables (net)	172.6	192.7	204.5
Intercompany Accounts (net)	14.5	(38.1)	(3.4)
Inventories	264.1	325.1	329.1
Other Current Assets	27.4	26.1	25.9
Total	536.0	622.0	717.4
CURRENT LIABILITIES			
Accounts Payable	85.2	98.3	107.9
Pre-Petition Current	62.8	18.5	17.7
Other Accrued Liabilities	60.5	120.0	125.4
Total Current Liabilities	208.5	236.8	251.0
WORKING CAPITAL	327.5	385.2	466.4
NONCURRENT ASSETS			
Property, Plant & Equipment (net)	195.3	283.7	360.2
Investments and Other Noncurrent Assets	145.6	143.1	140.1
Total Assets Less Current Liabilities	668.4	812.0	966.7
LESS NONCURRENT LIABILITIES			
Plant Closing Reserves	35.8	20.1	14.2
Minority Interest and Other	0.3	0.3	0.3
Pre-Petition Deferred	292.4	292.4	292.4
Total Noncurrent Liabilities	328.5	312.8	306.9
SHAREHOLDER'S EQUITY	$339.9	$499.2	$659.8

EXHIBIT X

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY MISSILES AND ELECTRONICS GROUP
NET SALES & OPERATING INCOME
($ Millions)

	Fcst. 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
NET SALES							
AM General	$ 715.4	$234.2	$194.8	$161.1	$202.4	$ 792.5	$ 812.1
Missiles Division	538.6	138.9	158.8	184.7	186.6	669.0	769.0
Sierra Research	128.8	22.6	21.2	53.5	52.8	150.1	180.0
Total	$1,382.8	$395.7	$374.8	$399.3	$441.8	$1,611.6	$1,761.1
OPERATING INCOME/(LOSS)							
AM General	$ (24.8)	$ 10.3	$ 6.2	$ 3.7	$ 8.0	$ 28.2	$ 32.2
Missiles Division	32.1	8.4	10.5	12.3	12.7	43.9	51.8
Sierra Research	10.4	1.2	1.1	4.4	3.3	10.0	13.3
Corporate	—	(0.3)	(0.3)	(0.3)	(0.3)	(1.2)	(1.1)
Total	$ 17.7	$ 19.6	$ 17.5	$ 20.1	$ 23.7	$ 80.9	$ 96.2
KEY STATISTICS							
Return on Sales	1.3%	5.0%	4.7%	5.0%	5.4%	5.0%	5.5%
Orders	$1,564	$ 182	$ 698	$ 208	$ 613	$1,701	$1,496
Backlog (End of Period)							
Firm	$2,402	$2,188	$2,512	$2,321	$2,491	$2,491	$2,225
Unfunded	615	588	288	286	23	23	—
Total	$3,017	$2,776	$2,800	$2,607	$2,514	$2,514	$2,225

EXHIBIT Y

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY MISSILES AND ELECTRONICS GROUP
MAJOR PROGRAM SALES
($ Millions)

DIVISION/ PROGRAM		Forecast 1986	Operating Plan 1987	1988
AM General				
M939 Trucks	Sales	$ 283.5	$ 79.4	$ —
	Deliveries	4,019	854	—
Hummer	Sales	$ 323.7	$ 476.4	$ 475.9
	Deliveries	14,422	19,601	18,642
Export Units	Sales	$ 31.3	$ 70.0	$ 178.6
	Deliveries	380	1,222	2,444
Foreign Military Sales—Gov't	Sales	$ 13.0	$ 80.1	$ 71.0
	Deliveries	380	1,589	920
Missiles Division				
Multiple Launch Rocket System (MLRS)	Sales	$ 346.6	$ 393.0	$ 479.0
—Launch Pod Containers (LPCs)	Deliveries	7,930	10,870	13,420
—Self-Propelled Loader Launchers (SPLLS)		58	45	54
Antisatellite Program (ASAT)	Sales	$ 97.7	$ 100.0	$ 80.0
Army Tactical Missile System (ATACMS)	Sales	$ 30.8	$ 66.0	$ 62.4
Sierra				
Command & Control	Sales	$ 77.5	$ 62.8	$ 76.0
Test & Evaluation, Avionics	Sales	$ 36.1	$ 48.1	$ 44.0
Systems Integration	Sales	$ 10.1	$ 27.3	$ 36.9

EXHIBIT Z

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY MISSILES AND ELECTRONICS GROUP
1987 PLANNED NEW ORDERS
($ Millions)

	1987 NEW ORDERS		
	FOLLOW-ON PROGRAMS	NEW PROGRAMS	TOTAL
DIVISION/PROGRAM			
AM General			
M939	$ 4	$ —	$ 4
Hummer	372	—	372
Export Units	198	—	198
Foreign Military Sales—Gov't	114	—	114
Service Parts/Other	68	—	68
Subtotal	756	—	756
Missiles Division			
Multiple Launch Rocket System (MLRS)	342	155	497
Antisatellite Program (ASAT)	104	—	104
Army Tactical Missile System (ATACMS)	15	—	15
Hypervelocity Missile (HVM)	14	—	14
Other	154	—	154
Subtotal	629	155	784
Sierra Research			
Command & Control	66	—	66
Test & Evaluation, Avionics	41	—	41
Systems Integration	2	28	30
Other	15	9	24
Subtotal	124	37	161
TOTAL	$1,509	$192	$1,701

[EXHIBIT Z, Continued]

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY MISSILES AND ELECTRONICS GROUP
1988 PLANNED NEW ORDERS
($ Millions)

	1988 NEW ORDERS		
DIVISION PROGRAM	FOLLOW-ON PROGRAMS	NEW PROGRAMS	TOTAL
AM General			
Hummer	$ 315	$ —	$ 315
Export Units	31	—	31
Foreign Military Sales—Gov't	19	—	19
Service Parts/Other	91	—	91
Subtotal	456	—	456
Missiles Division			
Multiple Launch Rocket System (MLRS)	234	150	384
Antisatellite Program (ASAT)	125	—	125
Army Tactical Missile System (ATACMS)	50	—	50
Hypervelocity Missile (HVM)	100	—	100
Other	172	—	172
Subtotal	681	150	831
Sierra Research			
Command & Control	83	—	83
Test & Evaluation, Avionics	49	—	49
Systems Integration	5	32	37
Other	12	28	40
Subtotal	149	60	209
TOTAL	$1,286	$210	$1,496

EXHIBIT AA

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY AIRCRAFT PRODUCTS GROUP
NET SALES & OPERATING INCOME
($ Millions)

	Fcst. 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
NET SALES							
Military Aircraft	$ 753.4	$163.7	$163.9	$156.9	$136.3	$620.8	$385.6
Commercial Aircraft	197.0	42.4	51.8	37.4	49.4	181.0	182.0
Modernization & Support	131.5	42.4	42.2	27.4	33.8	145.8	163.1
Total	$1,081.9	$248.5	$257.9	$221.7	$219.5	$947.6	$730.7
OPERATING INCOME							
Military Aircraft	$ 72.6	$ 15.4	$ 16.1	$ 15.6	$ 12.2	$ 59.3	$ 25.5
Commercial Aircraft	14.6	2.1	2.4	2.0	2.4	8.9	22.5
Modernization & Support	12.5	3.6	3.5	2.2	2.5	11.8	14.2
Corporate	—	(.3)	(.2)	(.3)	(.3)	(1.1)	(1.1)
Total	$ 99.7	$ 20.8	$ 21.8	$ 19.5	$ 16.8	$ 78.9	$ 61.1
KEY STATISTICS							
Return on Sales	9.2%	8.4%	8.5%	8.8%	7.7%	8.3%	8.4%
Orders	$ 898	$173	$164	$264	$180	$781	$706
Backlog (End of Period) Firm	$1,041	$966	$871	$913	$875	$875	$851

EXHIBIT BB

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY
AIRCRAFT PRODUCTS GROUP
MAJOR PROGRAM SALES & DELIVERIES
($ Millions)

DIVISION/PROGRAM		FORECAST 1986	OPERATING PLAN 1987	1988
Military Aircraft				
B-1B	Sales	$400.5	$275.0	$22.0
	Deliveries			
	—AFT	42	37	—
	—AIF	41	40	—
ADP's	Sales	$338.7	$318.0	$210.4
C-17	Sales	$ 7.9	$ 27.7	$137.9
Commercial Aircraft				
Boeing 747	Sales	$ 83.6	$ 71.2	$ 97.8
	Deliveries	37	27	38
Boeing 757	Sales	$ 54.8	$ 59.5	$ 56.6
	Deliveries	35	37	36
Boeing 767	Sales	$ 21.3	$ 25.2	$ 22.5
	Deliveries	29	34	35
Modernization & Support				
A-7 Domestic	Sales	$129.0	$126.1	$ 63.9
A-7 International	Sales	$ —	$ —	$ 5.0
A-7 Plus	Sales	$ —	$ 15.0	$ 90.4

EXHIBIT CC

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY
AIRCRAFT PRODUCTS GROUP
1987 PLANNED NEW ORDERS
($ Millions)

	1987 New Orders		
DIVISION/PROGRAM	Follow-On Programs	New Programs	Total
Military Aircraft			
B-1B Program	$ 22	$ —	$ 22
ADP's	318	—	318
C-17	32	—	32
Other	10	—	10
Subtotal	382	—	382
Commercial Aircraft			
Boeing 747	120	—	120
Boeing 757	43	—	43
Boeing 767	37	—	37
Other	2	—	2
Subtotal	202	—	202
Modernization and Support			
A-7 Domestic	78	—	78
A-7 International	—	9	9
A-7 Plus	—	110	110
Subtotal	78	119	197
Total	$662	$119	$781

[EXHIBIT CC, Continued]

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV AEROSPACE AND DEFENSE COMPANY
AIRCRAFT PRODUCTS GROUP
1988 PLANNED NEW ORDERS
($ Millions)

	1988 New Orders		
DIVISION/PROGRAM	Follow-On Programs	New Programs	Total
Military Aircraft			
B-1B Program	$ 22	$ —	$ 22
ADP's	210	—	210
C-17	90	—	90
Other	24	—	24
Subtotal	346	—	346
Commercial Aircraft			
Boeing 747	85	—	85
Boeing 757	99	—	99
Boeing 767	22	—	22
Subtotal	206	—	206
Modernization and Support			
A-7 Domestic	52	—	52
A-7 International	—	50	50
A-7 Plus	51	—	51
Other	1	—	1
Subtotal	104	50	154
Total	$656	$ 50	$706

ENERGY

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

IV. LTV ENERGY PRODUCTS COMPANY

Overview

LTVEP forecasts its macroeconomic and industry data based primarily on management's understanding of and experience in the energy products industry. While the forecasts presented are not derived from any one source in particular, they are consistent with most published economic analyses and with trends and events the industry is now experiencing.

All of LTVEP's main businesses—including the manufacturing and distribution of oil drilling and production equipment—are influenced by worldwide prices and demand for oil and natural gas. As such, the division's profitability and size are determined primarily by forces over which it can exert little control.

Like other companies in its industry, LTVEP has taken numerous actions to weather the current depressed market conditions. These actions fall into two related categories: asset disposals/downsizing and cost-cutting measures. LTVEP has disposed of certain non-performing assets. Southwest Industrial has been sold and agreements have been reached on Skagit and Evansville. Energy Products has also closed twenty-six store and sales office operations and discontinued certain unprofitable product lines. Additionally, management has instituted numerous cost reduction programs, including decreasing staff and upper and middle management positions, reducing manpower by 1,500 (or approximately 50%), reclassifying and downgrading job positions, renegotiating union contracts at Houston and Garland and significantly reducing systems and data processing costs. Finally, in an effort to maintain liquidity, the Fibercast subsidiary and various oil and gas properties were sold.

As a result of these measures LTVEP is a much smaller company going into the Plan period than it had been heretofore.

Environment and Issues

Oil Industry Assumptions

The following assumptions relating to the entire oil industry are incorporated into the 1987-1988 Plan:

—Oil and gas prices are projected to stabilize in the \$15.00 BBL and \$2.00 MCF range, respectively, and modestly improve to the \$18.00 BBL and \$2.10 MCF range during 1988.

—Though there is growing pressure by producing states for a "sliding scale" import tax, additional legislation is not anticipated in the Plan.

—Uncertainty and concern over OPEC's ability to maintain production quotas will continue to delay major increases in exploration and production expenditures.

—Projected price levels will result in a continuing increase of imported crude and a decline in U.S. production.

—The repeal of the Producers Gross Revenues Tax (PGRT) in Canada will somewhat improve energy industry cash flow and imposition of various provincial tax holidays will further improve the economic climate, although there is no expectation of a major resurgance of drilling activity.

Market Assumptions (Exhibit EE)

The following market assumptions were also considered while formulating the 1987-1988 Plan:

—Forecasted rigs running in 1987 will be down from 1986, but slightly improved over second/third quarter 1986 levels.

—Excess inventories, manufacturing capacities and services will continue to depress prices and margins.

—Acquisitions, mergers, consolidations, bankruptcies and the purchasing of reserves vs. drilling in the oil and gas industry will continue into 1987, thereby reducing cash flow and resources for exploration.

—Oil and gas price improvement will be insufficient to provide a major upturn during the time frame of this Plan.

Objectives

LTV Energy Products Company has a number of objectives to be accomplished in the two-year Plan period. The successful attainment of these goals will enhance the likelihood of meeting the projections outlined herein. The key objectives for the Energy Group are listed as follows:

—*Regain lost market share and customer confidence*—Energy Products enjoyed steady growth in market share from 1982 through the first quarter of 1986. However, because of the reorganization filing, LTV Energy Products has lost much customer confidence and favored status leading to an erosion of market share. Steps anticipated to counteract these problems are:

—Frequent communications with customers informing them of LTV Corporation's improved financial viability.

—Personal contact with major customers to resolve Chapter 11 concerns.

—Aggressively resolve customer pre-petition warranty claims.

—*Re-establish favored position with suppliers and vendors*—Through its leadership position in the

industry, Energy Products had established favored pricing, freight, credit terms and other commercial positions with suppliers and vendors. The vendor conditions which followed the filing have been disruptive to business, reducing advantages of "lowest" material acquisitions cost and disrupting service to customers. Major programs to re-establish relationships with suppliers and vendors are:

—Frequent communications with all major vendors to demonstrate LTV Corporation's improved financial viability.

—Personal contact with senior management of all major suppliers and vendors.

—Identify and use alternate sources of supply where improved trade terms are available.

—*Develop reduced cost systems/data processing concepts*—In the late 1970's and early 1980's, Energy Products, with the help of AT&T and IBM, developed a state-of-the-art on-line management system with annual maintenance and support costs of $5.0 million. This system provided a distinct advantage when sales volume was at $2.0 billion per year; as a $200 million company, however, these system and support costs have not decreased sufficiently. Hardware, software and maintenance contracts will be renegotiated to eliminate non-essential items and reduce cost of equipment retained. The communications network will be reconfigured to lower the cost for the downsized company and, longer term, an alternative approach will be implemented which will avoid dependence on a high fixed cost mainframe system.

—*Design and implement revised fringe benefit programs*—Despite significant efforts to reduce costs in the area of employee benefits, fringe costs have

risen from 26% of salaries in 1982 to 33% in 1986. This percentage increase is due to a substantial reduction in the number of active employees. The existing fringe benefit package must be re-evaluated in order to design and implement a more cost effective program. The revised program design will be completed and implemented by first quarter 1987. The LTVEP Plan includes savings of $3 million on an annualized basis as a result of the revised benefits.

—*Continued cost/expense reduction program*—The decline in demand for products and services triggered cost-cutting measures which have already been implemented. LTVEP will continue these cost-cutting measures. The Plan includes $2.0 million and $.5 million of cost reduction goals in the selling and administrative expense areas respectively, for 1987 and 1988.

—*Reduce excess inventory*—The precipitous decrease in demand for all energy-related products and services created significant excess inventory in all operating areas, with drilling machinery representing the most significant problem area. Efforts will be focused on further inventory reductions and cash generation.

—*Maintain positive cash flow from operations*—Energy Products has been able to generate substantial cash since the downturn of the energy industry in 1982. Liquidation of excess inventory, collection of receivables and sale of assets have played a major role in generating cash flow. Energy Products intends to continue to generate cash by tightly controlling costs and aggressively pursuing opportunities to sell excess inventory.

Capital Expenditures

LTVEP's capital expenditure program for the Plan includes only enough cash to prevent deterioration in the Company's property, plant and equipment and to assist in cost reductions. Total expenditures are currently forecast at $2.3 million per year for the two-year period and consist primarily of replacement and maintenance expenditures required at the current low operating levels.

Financial Results

1987 Net Sales (Exhibit DD)

The Energy Group's planned net sales for 1987 are $222 million, $80 million lower than 1986. The decrease is based on a continued glut of crude oil. The existing surplus of oil and gas will continue through 1987 leading to reductions in active rigs, new wells completed, need for tubular, general merchandise and production related products and demand for skid mounted and mobile drilling rigs. Sales will also be lower because of the forecast sale of Skagit and the sale of Fibercast in 1986 and the large rig package sales made to China in 1986 which are not expected to recur.

Distribution group sales are expected to decline by $44 million (25%) in 1987 due to the projected 16% worldwide decrease in average rig utilization. The U.S. average rig count is expected to drop to 750 in 1987, down 19% from 1986, with footage drilled showing a 14% decrease. The distribution group sales are also adversely affected by excess tubular inventories held by customers, particularly in the high-strength alloy and special end finish segments. Production equipment sales are forecast to decrease by $9 million or 20%, with the expected decrease in the number of new wells completed resulting in lower demand for production related products and a continuation of shut-in stripper wells reducing the subsurface repair market. Drilling equipment sales will decrease by $27 million (56%) due to a combination of the lack of demand for new rigs caused by low levels of worldwide rig utilization, significant levels of excess equipment inventory in the industry, an end to the large rig package sales to China and the sale of Skagit. Oil States Industries' sales expect a modest improvement of $2 million or 9% in 1987 due to increased sales to non-energy related markets, primarily in aerospace and defense.

1987 Operating Income/(Loss) (Exhibit DD)

The 1987 operating loss of $1.6 million is $37.2 million better than the forecast 1986 loss of $38.8 million, primarily due to reductions in operating costs, the elimination of losses caused by the liquidation of inventories below cost and the benefit of the 1986 Special Charge which reduced the carrying value of certain inventory expected to be sold during the Plan period. Overall loss reductions should also be aided by the full impact of benefits associated with the force reductions (including a lower severance cost in 1987). The distribution division's operating results are expected to improve $18.9 million from 1986's operating loss of $18.0 million through benefits from cost reductions, eliminations of inventory liquidations below cost and the gradual elimination of the adverse impact of the reorganization filing on many customers. Improvement of $4.5 million in the operating results for production equipment is expected in 1987 despite the elimination of Fibercast and reflects improved margins due to product mix and cost reductions. Drilling equipment's 1987 operating loss is expected to be $1.7 million, $12.4 million better than 1986 forecast due to cost reductions, increased volume of high-margin repair part sales, elimination of the inventory liquidation losses and the sale of Skagit. Oil States' operating results in 1987 are expected to improve by $1.6 million to $0.4 million operating income, reflecting the increased growth of non-oilfield product lines.

1987 Cash Flow (Exhibit FF)

The 1987 planned cash generation of $5.8 million is $1.2 million better than 1986, due to a reduction in the net loss. Inventory reductions will not generate cash equivalent to 1986 levels. Capital expenditures of $2.3 million reflect only essential programs designed to maintain existing facilities or reduce costs.

1988 Operating Plan

1988 operations are expected to improve slightly over the 1987 Plan levels, with sales of $237.1 million generating an operating income of $2.1 million. The key elements of this improvement are a moderate projected increase in oil prices and the continuing depletion of the existing gas surplus. These factors could combine to induce some additional rig activity, along with stimulating spending growth for both exploration and development. However, the continued existence of excess equipment inventories as well as supplies of oilfield equipment will combine to further squeeze prices and margins of oilfield goods. The average worldwide rig count is expected to reach 2,025 by 1988, an 11% increase over 1987 but still below 1986 levels. Domestically, the average U.S. rig count should grow by 10% to 825 rigs in 1988. Footage drilled in 1988 is also expected to improve by almost 22 million feet (18%) over the 1987 level, but still below 1986 activity. A net cash usage of $2.1 million is expected in 1988.

Major Risks and Opportunities

Achievement of the 1987 Plan faces risks arising from the general oil industry depression and the specific problems of operating under Chapter 11. These risks can be summarized as follows:

—Oil and gas prices may not stabilize as projected.

—LTV Energy Products Company might not regain its lost market share, especially in the capital goods market, and its favored position with suppliers and vendors.

—OPEC's willingness and ability to maintain stability in oil prices while increasing market share and remaining within the established production quotas might not be feasible.

—Employee retention.

However there are opportunities to improve the 1987 results which include:

—An improved political environment—The administration has expressed concern for national security, while Congress is indicating that trade-protective legislation is a priority.

—The natural gas surplus will continue but decline due to sharp reduction in deliverability replacement.

—A cold winter could spur gas well drilling in the spring of 1987, reducing the expected seasonal softness of the market.

—New exploration and drilling activity is expected to grow in the latter part of 1987 coinciding with the predicted rise in crude oil prices.

—Continued efforts to utilize idle plant capacity through the pursuit of outside machining and fabrication work which would aid financial performance.

EXHIBIT DD

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV ENERGY PRODUCTS COMPANY NET SALES & OPERATING INCOME
($ Millions)

	Forecast 1986	1987 Operating Plan 1st Qtr.	2nd Qtr.	3rd Qtr.	4th Qtr.	Year	Plan 1988
NET SALES							
Distribution	$ 179.1	$33.4	$28.6	$33.0	$40.0	$135.0	$142.9
Production Equipment	47.4	8.6	9.3	9.7	10.3	37.9	41.1
Drilling Equipment	48.7	5.2	6.6	4.9	4.8	21.5	22.8
Oil States	26.4	6.4	6.9	7.6	7.7	28.6	31.5
Eliminations/Other	(0.1)	0.2	(0.3)	(0.3)	(0.2)	(0.6)	(1.2)
Total	$ 301.5	$53.8	$51.1	$54.9	$62.6	$222.4	$237.1
OPERATING INCOME/ (LOSS)							
Distribution	$ (18.0)	$(0.1)	$(0.2)	$ 0.1	$ 1.1	$ 0.9	$ 2.5
Production Equipment	(5.3)	(0.4)	(0.3)	(0.1)	—	(0.8)	0.1
Drilling Equipment	(14.1)	(0.5)	(0.3)	(0.6)	(0.3)	(1.7)	(1.0)
Oil States	(1.2)	(0.1)	—	0.2	0.3	0.4	1.0
Eliminations/Other	(0.2)	(0.2)	(0.1)	(0.1)	—	(0.4)	(0.5)
Total	(38.8)	(1.3)	(0.9)	(0.5)	1.1	(1.6)	$ 2.1
Interest Expense and Other (net)	(35.8)	(1.2)	(1.3)	(1.2)	(1.3)	(5.0)	(4.8)
Loss Before Taxes	(74.6)	(2.5)	(2.2)	(1.7)	(0.2)	(6.6)	(2.7)
Special Charges	(168.0)						
Income Tax Charges	(0.3)	(0.3)	(0.3)	(0.3)	(0.3)	(1.2)	(1.2)
Net Loss	$(242.9)	$(2.8)	$(2.5)	$(2.0)	$(0.5)	$ (7.8)	$ (3.9)

EXHIBIT EE

LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV ENERGY PRODUCTS COMPANY
MARKETING/OPERATING PLAN

	Forecast 1986	Operating Plan 1987	1988
DRILLING ACTIVITY (Average Rigs)			
United States	925	750	825
Canadian	180	160	175
Free Foreign	1,075	915	1,025
Worldwide	2,180	1,825	2,025
MARKET ASSUMPTIONS—U.S.			
Wells Drilled (Thous.)	43.1	37.5	44.9
Footage Drilled (Million Ft.)	144.0	124.0	146.0
PRODUCT GROSS MARGINS (%)			
Distribution	14.1%	17.5%	17.3%
Production Equipment	24.4	28.2	29.2
Drilling Equipment	16.1	29.8	29.7
Oil States	29.4	26.9	27.5
Total (Average)	17.6%	21.8%	22.0%

EXHIBIT FF

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

LTV ENERGY PRODUCTS COMPANY CASH FLOW
($ Millions)

	Operating Plan 1987	1988
SOURCES OF CASH		
Net Loss	$(7.8)	$(3.9)
Depreciation	7.2	7.2
Working Capital (Excluding Cash, Debt and Intercompany Items)	11.1	(0.5)
Total	10.5	2.8
USES OF CASH		
Capital Expenditures	2.3	2.3
Other	2.4	2.6
Total	4.7	4.9
Net Sources of Cash Before Debt Repayments and Intercompany Transfers	5.8	(2.1)
Debt Repayment	(1.7)	(0.5)
Transfers (To)/From LTV	(5.4)	2.5
Net Decrease in Cash Position	$(1.3)	$(0.1)

EXHIBIT GG

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN
LTV ENERGY PRODUCTS COMPANY
SUMMARY OF FINANCIAL POSITION
($ Millions)

	Forecast 12/31/86	Operating Plan 12/31/87	12/31/88
CURRENT ASSETS			
Cash and Short-term Securities	$ 2.7	$ 1.4	$ 1.3
Receivables (net)*	(3.9)	(2.0)	2.8
Intercompany Accounts (net)	(2.6)	2.8	0.3
Inventories	58.3	49.7	44.8
Other Current Assets	7.2	7.2	7.2
Total	61.7	59.1	56.4
CURRENT LIABILITIES			
Notes Payable to Banks	2.2	0.5	—
Accounts Payable	6.8	14.8	14.8
Other Accrued Liabilities	20.5	16.5	15.9
Current Maturities of Long-term Debt	0.1	0.1	0.1
Total Current Liabilities	29.6	31.9	30.8
WORKING CAPITAL	32.1	27.2	25.6
NONCURRENT ASSETS			
Property, Plant & Equipment (net)	27.0	22.2	17.3
Investments and Other Noncurrent Assets	120.7	122.6	125.2
Total Assets Less Current Liabilities	179.8	172.0	168.1
LESS NONCURRENT LIABILITIES			
Long-term Debt	0.1	0.1	0.1
Minority Interest and Other	4.8	4.8	4.8
Pre-Petition Deferred	408.2	408.2	408.2
Total Noncurrent Liabilities	413.1	413.1	413.1
SHAREHOLDER'S DEFICIENCY	$(233.3)	$(241.1)	$(245.0)

* Assumes most of LTVEP receivables are sold to LTV Sales Finance. The negative receivable balance represents reserves for doubtful accounts which will remain on LTVEP books until the collectibility of the underlying accounts is resolved.

CAPITAL PLAN

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

V. CAPITAL EXPENDITURES

(Also See Capital Expenditure Sections of the Individual Group Plans)

Introduction

Each business group of LTV prepared a capital budget which includes its planned spending by "major" and "general improvement" projects over the next two years. LTV categorizes major projects as those greater than $500,000 for Steel, greater than $300,000 for Aerospace and Defense and greater than $250,000 for Energy Products. General improvement projects are all projects which fall below the above stated limits.

The capital plan is project oriented and covers multiple years of spending while the annual capital budget covers expenditures in one year increments. The capital budget for the ensuing year is approved by the LTV Capital Expenditure Committee (CEC) and by the Board of Directors. Individual projects contained in these plans cannot be submitted for approval until after the capital plans have been reviewed and approved. Commitments or expenditures on major projects may *not* commence until individually approved. Each major project for Steel which exceeds $5 million requires Board of Directors approval. Each major project for Aerospace and Defense or Energy Products which exceed $1 million requires Board of Directors approval. General improvement project spending may commence upon the review and approval of the capital plans. The 1987 capital budget of $459 million (including operating leases) was approved by the LTV Board of Directors on November 21, 1986.

Steel Operations

The Steel Group projects $282 million of capital expenditures in 1987. These expenditures are considered necessary due to the drastic reductions in capital spending in 1985 and 1986 in an effort to maintain liquidity. Capital spending is expected to average $121 million in 1985 and 1986 as compared to the previous six-year average (1979-1984) of $480 million annually. Major planned expenditures for 1987 cover the steelmaking facilities at Indiana Harbor and include: A ladle metallurgy/vacuum degassing project at the BOF shop and initial preparation for the H-3 blast furnace reline. Other major spending is projected at Cleveland for gauge control improvements and a reline of the C-6 blast furnace and at Canton for the forge press improvements. Expenditures for the completion of the Indiana Harbor H-4 blast furnace reline, which has already been approved and is in progress, are also included in the 1987 budget. The 1988 planned capital expenditures of $230 million represent a decrease of $52 million from the 1987 Plan, due primarily to the completion of the H-4 reline. In 1988, however, spending is planned to start for the completion of the C-6 furnace reline at Cleveland and H-3 furnace reline at Indiana Harbor. Additional projects for gauge control improvements at Cleveland and Indiana Harbor as well as the completion of the ladle metallurgy/vacuum degassing project at Indiana Harbor are also major capital items in 1988. The Plan currently assumes *no* capital is expended on a Warren blast furnace reline.

Aerospace and Defense

Spending on major capital projects and general improvements in 1987 is planned at $120 million. Improvements anticipated to be placed on operating leases total $55 million, an increase of $35 million over 1986. The 1987 spending is primarily due to the Advanced Development Projects, ATACMS Program, C-17 Program and the proposed Pedestal Mounted Stinger (PMS) Project. In 1988, spending and general improvements on major capital projects total $118 million, approximately the same level as 1987. Virtually all of LTVAD's capital spending in 1987 and 1988 relates to existing contractual commitments with customers. Improvements planned to be financed as operating leases increase in 1988 from $55 million to $68 million. The expenditures for 1988 relate principally to the same projects as in 1987.

Energy Products

The Energy Products capital expenditures of $2 million for both 1987 and 1988 represent a $3 million decrease from 1986. The Energy Group's capital expenditures for both 1987 and 1988 will be primarily focused on maintenance of existing facilities or reduction of operating costs.

Summary

The capital spending plans of each of the Company's operating groups is shown in more detail in the operating plans of the respective groups.

EXHIBIT HH

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

CAPITAL EXPENDITURES BY PROJECT CATEGORY
($ Millions)

	Operating Plan 1987	Operating Plan 1988
Major Programs and Projects		
Steel Operations	$234	$182
Aerospace and Defense	74	89
Subtotal	308	271
General Improvement Projects		
Steel—Rolls	18	18
—Other	20	22
Aerospace and Defense	46	29
Energy Products	2	2
Subtotal	86	71
Total Project Spending	394	342
Capitalized Leases and Interest		
Steel Operations	10	8
Total Property Additions	404	350
Operating Leases		
Aerospace and Defense	55	68
Total Capital Expenditures		
Steel Operations	282	230
Aerospace and Defense	175	186
Energy Products	2	2
Total Capital Expenditures	$459	$418

EXHIBIT II

THE LTV CORPORATION AND SUBSIDIARIES
1987-1988 OPERATING PLAN

CAPITAL EXPENDITURES BY GROUP AND MAJOR PROJECT
($ Millions)

	Operating Plan 1987	Operating Plan 1988
Steel		
H-4 Reline	$ 70	$ —
C-6 Reline	10	44
H-3 Reline	20	30
Ladle Metallurgy/Vacuum Degassing	60	16
Other Major Projects	73	93
Mill Rolls	20	18
General Improvement Projects	19	21
Capitalized Interest	10	8
Total Steel	282	230
Aerospace/Defense		
Aircraft Products Group		
Advanced Development Programs	$ 40	$ 50
C-17	2	3
Other Major Projects	1	2
General Improvements Programs	33	16
Operating Leases	30	45
Total APG	106	116
Missles & Electronics Group		
MLRS	6	2
ASAT	1	2
ATACMS	5	4
HVM	1	3
Hummer	1	1
Missle Development & Technologies	10	7
Other Major Projects	5	—

[EXHIBIT II, Continued]

	Operating Plan 1987	1988
Missles & Electronics Group (Continued)		
General Improvement Projects	15	28
Operating Leases	25	23
Total M&EP	69	70
Total Aerospace and Defense	$175	$186
Energy		
General Improvement	2	2
Total Energy	2	2
TOTAL CAPITAL EXPENDITURES	$459	$418

IOD/LD SEPPAA TRUSTEESHIP WORKING GROUP MINUTES OF DECEMBER 15, 1986

Attendees:

Mark Blank, LD
Ray Collins, IOSD
Robert Joy, IOSD
Robert Klein, CPD
Harvey Lebson, CPD
Roger Lerner, LD
Jesse Paredes, CPD
Al Rettig, ASD

1. Consolidated Pension Plan for Salaried Employees of Jones and Laughlin Corporation and Subsidiary Companys (Case No. 08382400)

2. Jones and Laughlin Pension Plan (Hourly) (Case No. 08382500)

3. Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Hourly) (Case No. 08383100)

Additional Attendees:

Allen Beard, ASD
Bill Beyer, LD
John Bjarnason, CPD
Dave Gill, CPD
Lonie Hassel, LD
Scot McCulloch, LD
Martha Moeller, M&R
Lincoln Weed, LD
Eugene Weinzweig, CPD

Purpose of Meeting

The meeting of the IOD/LD SEPPAA Trusteeship Working Group was called to discuss the involuntary termination of the above listed pension plans (Plans) maintained by the LTV Corporation. The PBGC is aware that the Plans do not meet the minimum funding standard.

Background

1. The PBGC has received notice that a reportable event has occurred with respect to the Plans. The plan sponsor, LTV Corporation is in Chapter 11 proceedings.

2. The PBGC has involuntarily terminated a related plan, Republic Steel Salaried Plan (Plan), under the mandatory provisions of section 4042. The Plan did not have assets to pay benefits which were currently due. Please refer to the IOD/LD SEPPAA Trusteeship Working Group minutes of September 23, 1986.

3. The Plans requested and were granted minimum funding waivers for the 1984 plan years. The total amount of the waivers was $175 million and security was obtained. The Plans requested and were denied minimum funding waivers for the 1985 plan year in the amount of $205,253,272.

4. Martha Moeller presented a summary of the Plans' financial condition prepared by M&R. The estimated underfunding for vested benefits in the two hourly plans, Case Numbers 08382500 and 08383100, is $1.8 billion and the underfunding in the salaried plan, Case Number 083824, is $220 million. The cost of shutdown benefits is estimated to be in the range of $400 to $700 million in addition to the underfunding for vested benefits.

5. No employer contributions appear to have been made for the 1985 plan year. The Plans are in violation of the minimum funding standards. Some employer contributions appear to have been made in 1986 to amortize the 1984 waivers.

6. There are approximately 40,000 to 45,000 participants in pay status receiving approximately $31 million per month. An estimated 8,000 participants are entitled to shutdown benefits.

7. Mike Wells, Associate Director, IOD, presented an overview of LTV's financial situation with a concentration on its Steel Divisions. Mr. Wells represented that the probability that LTV can survive with the Plans intact is "de minimis."

Involuntary Termination

The group requested additional analysis before making a recommendation on involuntary termination. The financial and actuarial data presented to the group was based on information received by the PBGC to date.

Action Items

1. Martha Moeller was requested to analyze the Plans' cash flow situation and present her findings to the group on Thursday, December 18, 1986. The information to be assembled on each plan is:

   a. Estimated annual increased loss if the Plans continue;

   b. Estimated amount of benefits being paid above guaranteed levels;

   c. Estimated amount of contributions required to bring the funding standards account into compliance;

   d. Estimated annual amount of contributions required to maintain the funding standards account; and

   F. Estimated cost of shutdown benefits.

2. Eugene Weinzweig was requested to obtain participant information by plan, plant and location.

3. Mike Wells was requested to prepare the following financial information:

   a. Estimated cost per labor hour to carry the Plans;

   b. Estimated cost of labor per ton of steel produced and the percentage the Plans represent per ton;

   c. List of plants projected to be shutdown and their estimated date;

   d. Obtain financial information on LTV's major entities and estimate the recovery of employer liability under SEPPAA; and

e. Determine LTV's ability to make required contributions.

4. William Beyer was requested to obtain written confirmation from LTV of their intent to make future contributions with respect to the Plans.

The group felt the analysis needs to concentrate on LTV's ability to fund the Plans on an ongoing basis to prevent their financial condition from deteriorating further.

LEBOEUF, LAMB, LEIBY & MACRAE
A Partnership Including Professional Corporations
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 457-7500

December 16, 1986

Edward R. Mackiewicz, Esq.
General Counsel
Pension Benefit Guaranty Corporation
2020 K Street N.W.
Washington, D.C. 20006

RE: Jones & Laughlin Retirement Plan (EIN 34-0486510, PN 015) ("J&L Salaried Plan")

Jones & Laughlin Hourly Pension Plan (EIN 34-0486510, PN 016) ("J&L Hourly Plan")

Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (EIN 34-0486510, PN 001) ("Republic Hourly Plan")

Dear Mr. Mackiewicz:

On behalf of our clients, The LTV Corporation and its affiliates within the LTV controlled group of corporations ("LTV"), this will confirm information previously given orally to you and other PBGC officials concerning the three plans identified above (the "Plans").

As you know, the Internal Revenue Service recently denied LTV's applications under the Internal Revenue Code ("Code") section 412(d) for funding waivers for each of the Plans with respect to plan year 1985. In addition, the Service revoked the waivers for each of the Plans previously granted with respect to plan year 1984. As a result, each of the Plans is currently not in com-

pliance with the funding requirements of ERISA section 302 and Code section 412.

I am authorized by LTV to tell you that, because LTV is currently in reorganization under Chapter 11 of the Bankruptcy Code, LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies arising upon the denial of the funding waivers identified above.

I am further authorized by LTV to tell you that LTV does not intend, and is not likely to have the ability, to fund the Plans for future years.

If you need any further information concerning these plans, please let me know.

Very truly yours,

/s/ Frank Cummings
FRANK CUMMINGS

[PBGC Logo] Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C.
20006-1806

Dec. 18, 1986

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation (the "PBGC") regarding a proposed profit sharing plan to be provided for individuals who are currently participants in the Pension Plan for   , sponsored by A. Specifically, you ask whether the proposed plan will be considered a continuation of, or successor to, the Plan, adoption of which would cause PBGC to deem termination of the Plan ineffective.

The facts as we understand them as as follows. A has filed a Notice of Intent to Terminate the Plan with the PBGC and has proposed a termination date of December 16, 1986. The amount of unfunded guaranteed benefits for the Plan as of that date is approximately $1.1 million. A is currently operating under Chapter 11 of the Bankruptcy Code. B, your client, has made an offer to acquire A in the bankruptcy proceeding. B has proposed to provide coverage, after the acquisition, for former Plan participants in a standard profit sharing plan.

Based upon our review of your summary of the provisions of the proposed profit sharing plan, the PBGC will not assert that the adoption of the proposed profit sharing plan is a continuation of the Plan and will treat the termination of the Plan as effective upon completion of the distress termination requirements. Please note that the view expressed above is contingent upon the plan summary being an accurate description of the profit sharing plan. To the extent that the implemented profit sharing plan differs from the summary, this opinion cannot be relied upon as an indicator of the PBGC's position.

Very truly yours,

EDWARD R. MACKIEWICZ
General Counsel

IOD/LD SEPPAA TRUSTEESHIP WORKING GROUP MINUTES OF THURSDAY, DECEMBER 18, 1986

Attendees:

Mark Blank, LD	Robert Klein, CPD
Ray Collins, IOSD	Roger Lerner, LD
Robert Joy, IOSD	Al Rettig, ASD

1. Consolidated Pension Plan for Salaried Employees of Jones and Laughlin Corporation and Subsidiary Companies (Case No. 08382400)

2. Jones and Laughlin Pension Plan (Hourly) (Case No. 08382500)

3. Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Hourly) (Case No. 08383100)

Additional Attendees:

Allen Beard, ASD	Bill Beyer, LD
Dave Gustafson, CPRD	Martha Moeller, M&R
Lonie Hassel, LD	Scot McCulloch, LD
Lincoln Weed, LD	Mike Wells, IOD

Background

1. The above listed pension plans (Plans) were considered by the IOD/LD SEPPAA Trusteeship Working Group for involuntary termination on December 15, 1986. Please refer to the minutes of that meeting for details.

2. The group reviewed the status of the action items established at the previous meeting:

a. LD has received written confirmation from LTV's counsel stating that LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies arising upon the denial of the funding waivers by the IRS.

b. Robert Klein presented an analysis of LTV's ability to make ongoing contributions to the Plans. His conclusion was that LTV could not afford to maintain the Plans under their own optimistic projections. Bob felt that LTV's assumptions concerning the steel industry are reasonable; however, their assumptions concerning LTV's projections are optimistic. Bob submitted a memorandum to the group indicating that a projected cash flow of $300 million per year together with a planned cash build-up of just over $1 billion by the end of 1988 would not be sufficient to finance a plan of reorganization and the ongoing Plans. The group thus concluded that termination would occur; the relevant question was whether it would be now or later.

c. In response to the group's request, Martha Moeller of M&R presented an analysis of the Plans based on information available:

1. The DUECs as of December 31, 1986 were $384 million.

2. The Plans' estimated underfunding, assets less liabilities, without shutdown benefits is $2.4 billion.

3. The estimated increase in the underfunding is approximately $13 million on an annual basis.

4. The amount being paid to retirees and beneficiaries under the Plans is approximately $30 million per month of which an estimated $3 million per month is being paid in excess of guarantees.

5. The Plans have assets to carry them for approximately 4 to 5 years without additional contributions.

d. The group reviewed the situation with respect to shutdown benefits payable by the Plans. Due to the

lack of time, a detailed analysis by plant could not be completed. However, the anticipated total shutdown benefits payable from the Plans as of Decembr 31, 1987, is estimated to be $463 million. The total amount of shutdown benefits payable by the Plans is expected to increase to $554 million by December 31, 1988. Most of the cost of the shutdown benefits is attributable to the J&L plants. A review of LTV's business plan indicates that they have idled or plan to idle approximately 40 percent of the production capacity of the J&L plants and over 60 percent of the Republic plants. An analysis of the portion attributable to plants not already idled was not available.

DELETED:

Privileged Attorney—

Client and Attorney Work Product Information

[Deletions as in Administrative Record.]

DELETED:

Privileged Attorney—

Client and Attorney Work Product Information

[Deletions as in Administrative Record.]

DELETED:

Privileged Attorney—

Client and Attorney Work Product Information

[Deletions as in Administrative Record.]

Involuntary Termination:

The group concluded that before a final decision could be reached to involuntarily terminate the Plans, the incremental cost of the shutdown benefits for the plants scheduled for shutdown in LTV's business plan needs to be analyzed. This information is to be obtained by Dave Gustafson.

[The following is an excerpt from Form 10-K for The LTV Corporation for fiscal year ended December 31, 1986.]

On August 19, 1986, certain bank lenders to the Company appealed the Retiree Order. Such appeal was rendered moot in October 1986, when a bill was signed into law which amended Chapter 11 of the Bankruptcy Code to require that LTV and its subsidiaries continue to pay through May 15, 1987 retiree medical and hospital insurance benefits which they were providing prior to their filing of petitions under Chapter 11. There are additional legislative proposals in Congress which, if enacted, may either continue such requirements or give priority to certain claims of retired former employees in the Chapter 11 proceedings. The Company expects that at a minimum the May 15, 1987 deadline will be extended.

At December 31, 1986, the aircraft products group had approximately 10,800 employees. Of these, approximately 5,600 are hourly employees, 4000 of whom are subject to collective bargaining agreements between the group and various unions. The United Auto Workers ("UAW") represents approximately 3,800 of the hourly employees primarily through the Dallas, Texas local of the UAW. The labor agreement was entered into on June 30, 1985, and will expire in July 1988.

At December 31, 1986, the missiles and electronics group had approximately 9,000 employees. Of these, approximately 3,900 are hourly employees, including approximately 2,300 of whom are subject to collective bargaining agreements between the group and various unions. The UAW represents approximately 2,300 of the hourly employees primairly through the South Bend, Indiana local. The labor agreement will expire in June 1988. Negotiations for an initial collective bargaining agreement covering approximately 950 employees at a Camden, Arkansas plant were unsuccessful and a strike commenced on June

22, 1986 and is continuing. Approximately 45% of the bargaining unit struck and were subsequently replaced in early July. Several meetings to negotiate were held thereafter, but no substantive progress has been made. The Company cannot predict the outcome of the negotiations or their effect on the missiles and electronics group.

As of December 31, 1986, the energy products group had approximately 1,400 employees, compared with 3,000 employees (excluding Republic Supply Division, which was sold) at December 31, 1985, and 3,200 employees at December 31, 1984. The majority of the hourly employees at the Houston and Garland, Texas facilities are covered under agreements with the International Association of Machinists and Aerospace Workers, which expire at the Houston facility on February 12, 1989 and at the Garland facility on April 1, 1987. Certain other hourly employees at the Houston facility are covered under an agreement with the International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers which expires on February 12, 1989. See "Item 2. Properties—Energy Products."

ITEM 2. PROPERTIES

LTV has recently entered into a lease (which is subject to Court approval) to reduce the office space in LTV Center in Dallas from 223,000 square feet to 122,000 square feet. The new lease expires in July 1993. The following sets forth a description of the properties of LTV's four opening groups. Those Company facilities which the Company has determined to be necessary for future operations are generally adequately maintained and suitable for their operations.

Steel

The steel group currently has certain facilities and raw material interests that the steel group has identified as "primary", "supplementary" and "non-operating" in

an effort to prioritize its capital expenditures in steel, promote production efficiencies and develop a strategy to modify production to meet changing business conditions in the steel industry. Provisions associated with the idling or shutdown of non-operating facilities have previously been recognized by the steel group. See "Special Charges" note to the financial statements. The steel group is currently operating the supplementary facilities. The steel group presently intends to retain and utilize those facilities designated as primary, and to divest or otherwise dispose of those identified as non-operating. The steel group will continue to review its steel operations including the supplementary facilities, and classifications of particular facilities may change as future business conditions warrant.

[The following is an excerpt from Form 10-K for LTV Steel Company for fiscal year ended December 31, 1986.]

Excluding liabilities which are expected to be settled in a plan of reorganization, approximately 6 percent of the total charges are expected to result in cash outlays, most of which will take place within the next five years.

Special charges of $2,730,000,000 were provided as a result of the continuing adverse business and market conditions and to recognize the burdensome effect and the diminution of economic value resulting from the decisions after filing under Chapter 11 to wind down, shut down or dispose of facilities or businesses that were unprofitable or noncash generating. Special charges of $661,000,000 were recorded to writedown the following facilities and to provide for the related employee (other than pensions which have been recognized separately) and other associated costs: the Electric Furnaces and the Blooming Mill at the Pittsburgh Works; a coke and by-products facility and a slabber at the Indiana Harbor Works; the Cambell, Ohio seamless tubular mill; the remaining bar operations at the Chicago, Illinois plant with the exception of the 11 inch bar mill, wire mill and coke plant; the Hammond and Mahoning cold finished bar plants; the partial writedown of certain steelmaking facilities at the Warren plant; and the write-off of investments in and the cost of withdrawing from operations of a number of the Company's uneconomical coal producing facilities. On August 6, 1986, the Court permitted the Company to reject the Reserve Mining Company ("Reserve") partnership agreement. Following this action, the Company recorded a provision of $208,000,000 with respect to a liability for the Republic-Reserve, Inc. (a subsidiary of LTV Steel) share of Reserve's outstanding debt and related accrued interest and the Company's write-off of its investment in Reserve and two other ore ventures from which the Company does not expect to con-

tinue to purchase ore. The Company also recorded $600,000,000 for potential claims which may arise from the rejection of executory contracts. While management currently believes that it has made an adequate provision for the liabilities to be incurred in connection with the rejection of such executory contracts, there can be no assurance as to the amount of the ultimate liabilities, the impact of such liabilities on a plan of reorganization, or how such liabilities will be treated in a plan of reorganization. An additional $1,145,000,000 was recorded in the second and third quarters as an estimate for probable claims associated with the termination by the PBGC of the major steel salaried and hourly pension plans. See "Employee Benefits" note. Also, $116,000,000 was recorded for the write-off of debt discount and debt issue expense in order to adjust the carrying values of the debt issues to the estimated amount of the debtholders' claims in bankruptcy.

In May 1985, the Company indefinitely idled the primary steelmaking operations of the Aliquippa, Pa. Works. In connection with the idling, a special charge of $380,000,000 was recorded to provide for the reduction in economic value of the facility, as well as the personnel and other related costs associated with this action. Also, LTV Steel's results for 1984 included similar charges of $74,000,000 related to rationalizations and capacity consolidation.

INVENTORIES

The percentage of consolidated inventories valued on the LIFO method was 92 percent and 94 percent at December 31, 1986 and 1985, respectively.

IOD/LD SEPPAA TRUSTEESHIP WORKING GROUP MINUTES OF MONDAY, JANUARY 5, 1987

ATTENDEES:

Mark Blank, LD	Jesse Paredes, CPD
Ray Collins, IOSD	Al Rettig, ASD
Robert Joy, IOSD	Alta Underwood, CPD
Roger Lerner, LD	

The group was reminded that draft copies of the revised involuntary termination guidelines and the SEPPAA compliance letters have been distributed for comment. The due date is January 6, 1987.

1. Consolidated Pension Plan for Salaried Employees of Jones and Laughlin Corporation and Subsidiary Companies (Case No. 08382400)

2. Jones and Laughlin Pension Plan (Hourly) (Case No. 08382500)

3. Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Hourly) (Case No. 08383100)

Additional Attendees:

Dave Gill, CPD	Scot McCulloch, LD
Dave Gustafson, CPRD	Lincoln Weed, LD
Lonie Hassel, LD	Mike Wells, IOD

1. The above listed pension plans (Plans) were considered by the IOD/LD SEPPAA Trusteeship Working Group for involuntary termination on December 15, 1986 and December 18, 1986. Please refer to the minutes of those meetings for details.

2. Dave Gustafson presented revised estimated data concerning the Plans funding status, cost of shutdown benefits, due and unpaid employer contributions and monthly benefit payments:

a. Funding Status: The estimated underfunding of the Plans as of December 31, 1986, is $2.1 billion. This amounts represents the present value of vested benefits less plan assets net of due and unpaid employer contributions. The underfunding is expected to increase by an estimated $65 million as of December 31, 1987 and by an additional $63 million as of December 31, 1988.

b. Shutdown Benefits: The present value of shutdown benefits that would be guaranteed if a shutdown is declared before termination is estimated to be $400 million as of December 31, 1987. The estimated present value of nonguaranteed supplements attributable to shutdown is estimated to be $300 million as of December 31, 1987. The estimated amount of shutdown benefits that would be guaranteed will increase to $500 million as of December 31, 1988. The amount of nonguaranteed shutdown benefits is expected to remain constant through December 31, 1988. The approximate number of participants eligible for shutdown benefits is 6,100, thirty-six hundred from the Jones and Laughlin Plans and twenty-five hundred from the Republic Hourly Plan. Approximately two thousand participants have been granted shutdown benefits since January 1, 1986.

c. Due and Unpaid Employer Contributions: The estimated amount of due and unpaid employer contributions is $385 million as of December 31, 1986. This amount does not include waivers with security. The future contributions requirement for the Plans is $185 million annually. The annual amount of future contributions is $232 million in the event of complete shutdown.

d. The monthly amount of benefit payments is $30 million. Included in this amount is $3 million being paid for nonguaranteed supplements.

3. Mike Wells presented his finding concerning anticipated plant closings by LTV Steel Corporation. The anticipated closings will reduce LTV's capacity by one third. This includes several major facilities which are presently classified as indefinitely idled. The additional anticipated closings represent twenty-five percent of LTV's capacity.

DELETED:

Privileged Attorney—

Client and Attorney Work Product Information

[Deletions as in Administrative Record.]

DELETED:

Privileged Attorney—

Client and Attorney Work Product Information

[Deletions as in Administrative Record.]

The group concluded that the above analysis assumes conservative estimates. No additional reductions were taken based on changes in the economy, increase in liability by changes in assumptions and/or voluntary termination in less than one year.

Involuntary Termination

The group was unanimous in recommending that the Plans be involuntarily terminated due to failure to meet the minimum funding standards and to avoid unreasonable deterioration of the financial condition of the plans.

The next meeting of the IOD/LD SEPPAA Trusteeship Working Group was scheduled for Thursday, January 8, 1987, at 1:30 PM in the IOD Conference Room.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 87-C-0232
Judge Owen

IN RE: JONES & LAUGHLIN HOURLY PENSION PLAN

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W., Washington, D.C. 20006
Applicant,

v.

THE LTV CORPORATION, as Administrator of the Jones & Laughlin Hourly Pension Plan
2001 Ross Avenue, Dallas, Texas 75201-2911
Respondent.

CONSENT ORDER

[Filed Jan. 13, 1987]

Upon consideration of the Petition and Application of the Pension Benefit Guaranty Corporation for an Order to Show Cause, Appointment of a Statutory Trustee and a Decree of Pension Plan Termination, the Affidavits and Memorandum of Points and Authorities filed in support thereof, and the Order to Show Cause issued with respect thereto, and it appearing to the Court that The LTV Corporation has received notice of the Petition and the Order to Show Cause, and having consented to this order,

R.O.
[Robert Owen]

it is by this Court,

ORDERED: that the Jones & Laughlin Hourly Pension Plan is terminated, and it is,

FURTHER ORDERED: that the termination date of the Jones & Laughlin Hourly Pension Plan is January 13, 1987, and it is

FURTHER ORDERED: that the Pension Benefit Guaranty Corporation is appointed statutory trustee of the Jones & Laughlin Hourly Pension Plan, with all the powers conferred on such a trustee by Section 4042(d) of the Employee Retirement Income Security Act of 1974, *amended by* the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 (1986), 29 U.S.C. § 1342(d), *as amended*, and otherwise granted by law, and it is,

FURTHER ORDERED: that The LTV Corporation and any other person having possession, custody or control of any records, assets or other property of the Jones & Laughlin Hourly Pension Plan, shall transfer, convey and deliver to the Pension Benefit Guaranty Corporation, as statutory trustee, upon its request, all such records, assets or property.

Date: January 12, 1987

/s/ Robert Owen
United States District Judge

THIS ORDER is consented to by:

THE LTV CORPORATION, as Administrator of the Jones & Laughlin Hourly Pension Plan

By: /s/ Frank Cummings
FRANK CUMMINGS
LeBoeuf, Lamb, Leiby & MacRae
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500

PENSION BENEFIT GUARANTY CORPORATION

By: /s/ John H. Falsey
JOHN H. FALSEY
Acting General Counsel
Pension Benefit Guaranty Corporation
2020 K St., N.W.
Washington, D.C. 20006
(202) 778-8820

[The following is an excerpt from Form 10-Q for The LTV Corporation for Quarter ended March 31, 1987.]

Operating income was $15.5 million for the first quarter of 1987 compared with $9.4 million in the first quarter of 1986. The increase in operating income was primarily due to improved gross profit and reduced administrative expense related to deliveries under a follow-on contract for the M-939 5-ton trucks. The increase in operating income was partially offset by lower income from the MLRS program as a result of the annual economic price adjustment having an effect of approximately $1.4 million and by reduced deliveries of rocket launchers.

Energy Products

Sales decreased to $56 million in the first quarter of 1987 compared with sales of $113 million in the first quarter of 1986. Sales declined for all product lines, with the greatest decrease being experienced in general merchandise. Tubular products, general merchandise, drilling equipment and production equipment sales decreased by $15 million, $24 million, $7 million and $9 million, respectively. These sales declines were primarily due to reduced activity in the domestic oil and gas industry as evidenced by a 43% decline in the average number of rigs operating in the United States (826 rigs operating in the 1987 quarter compared with 1,439 rigs in the 1986 quarter) and to the sale in 1986 of certain assets of Fibercast Company and of the assets of the Bearing Pad Division.

The group's operating income for the 1987 first quarter of $0.9 million was $4.6 million better than the 1986 first quarter loss of $3.7 million primarily due to lower product costs resulting from writedowns recorded in 1986 and to reduced operating costs, including depreciation and costs associated with workforce reduction programs.

Other Operating Considerations

The Company will continue to review its operations to determine which, if any, facilities should be considered for curtailment, idling, writedown or shutdown. Additional executory contracts will also continue to be reviewed to determine whether they should be assumed or rejected.

Interest Expense

Interest expense decreased by $70.6 million to $10.3 million in 1987 from the comparable 1986 quarter due to the Chapter 11 accounting practice of accruing interest only on those debt issues which initially have been determined to be fully secured. Interest expense would have been $61.2 million greater in 1987 if interest had been accrued on all debt.

Corporate Income (Expense), Net

Net corporate income of $5.6 million in the first quarter of 1987 increased by $1.3 million from the first quarter of 1986 principally due to an $8.4 million increase in interest income generated by higher average invested cash balances, partially offset by $4.0 million of bankruptcy administrative expenses incurred in the 1987 quarter whereas no such expenses were incurred in the 1986 quarter.

[The following is an excerpt from Form 10-Q for LTV Steel Company for Quarter ended March 31, 1987.]

The average operating rate at the Company's steel plants during the first quarter of 1987 was 93% compared with 62% in the fourth quarter of 1986 and 66% in the first quarter of 1986. The 1987 operating rate is based on a lower production capability than the 1986 rates, reflecting idled and shutdown facilities. Raw steel production decreased by 3% to 2.90 million tons in the first quarter of 1987 from 2.98 million tons in the first quarter of 1986.

The operating income for the first quarter of 1987 of $99.6 million improved by $163.6 million from the 1986 first quarter operating loss of $64.0 million. The improvement in operating results for the first quarter of 1987 was due, in part, to savings that resulted from elimination of substantially all past service pension costs, reduced costs related to rejected raw material contracts and reduced or eliminated costs associated with previously idled facilities (which had incurred average operating losses of approximately $10 million per month in the 1986 first quarter prior to their idling). In addition, successful cost reduction programs, the higher operating levels as a result of a work stoppage at a major competitor and a favorable product mix all contributed to the improvement.

The Company depreciates property using a variable production rate method. The noncash charges for depreciation were increased from the computed straight-line amounts by $8.4 million and reduced by $1.6 million in the 1987 and 1986 first quarters, respectively. During the first quarter of 1987, the Company utilized a depreciation rate of 121% as a result of the higher operating level, while in 1986 a 97% rate was used in order to maintain the 75% average required by the Company's policy. Depreciation was computed in accordance with

the modified straight-line method as described in Note (6) to these financial statements.

The Company will continue to review its operations to determine which, if any, facilities should be considered for curtailment, idling, writedown or shutdown. Additional executory contracts will also continue to be reviewed to determine whether they should be assumed or rejected.

Interest and Debt Discount Expense

Interest and debt discount expense of $6.9 million in the 1987 first quarter decreased by $35.4 million from the 1986 first quarter primarily due to the Chapter 11 accounting practice of accruing interest only on those debt issues which initially have been determined to be fully secured and due to an $8.2 million decrease in affiliated interest expense. Outside interest expense would have been $23.3 million higher in 1987 if interest and debt discount had been recognized on all debt.

Corporate Income (Expense), Net

Net corporate income of $2.4 million for the first quarter of 1987 increased by $1.6 million from $0.8 million in 1986 principally due to a $4.3 million increase in affiliated interest income due to increased cash advances to LTV, partially offset by $2.6 million of bankruptcy administrative expenses in the 1987 quarter whereas no such expenses existed in the 1986 quarter.

For information regarding income taxes, see Note (4) to these financial statements.

UNITED STATES SENATE
WASHINGTON, DC 20510

July 1, 1987

Ms. Kathleen P. Utgoff
Executive Director
Pension Benefit Guaranty Corporation
2020 K Street N.W.
Washington, D.C. 20006

Dear Kathy:

After many months of difficult negotiations, the United Steelworkers and LTV have reached a settlement on a new collective bargaining agreement. The proposal includes a pension arrangement to address the loss of retiree benefits resulting from PBGC's termination of LTV's pension plan. As you know, that action was a devastating blow to many retirees who saw their pensions reduced by as much as fifty percent.

We are deeply concerned about the possible reaction by PBGC to this new arrangement. Therefore, we strongly urge you to withhold any administrative or legal action that could frustrate the implementation of the new pension benefit arrangement until we have personally met to discuss this issue.

We look forward to working with you in a spirit of cooperation to protect the retirement security of the workers and retirees of LTV Steel.

Sincerely,

/s/ Howard M. Metzenbaum
HOWARD M. METZENBAUM
United States Senator

/s/ Louis Stokes
LOUIS STOKES
United States
Representative

/s/ Robert C. Byrd
ROBERT C. BYRD
United States Senator

/s/ John Heinz
JOHN HEINZ
United States Senator

/s/ Edward F. Feighan
EDWARD F. FEIGHAN
United States
Representative

/s/ James A. Traficant, Jr.
JAMES A. TRAFICANT, JR.
United States
Representative

/s/ Austin J. Murphy
AUSTIN J. MURPHY
United States
Representative

/s/ Dennis E. Eckart
DENNIS E. ECKART
United States
Representative

/s/ Tom Bevill
TOM BEVILL
United States
Representative

/s/ Joseph M. Gaydos
JOSEPH M. GAYDOS
United States
Representative

/s/ John Glenn
JOHN GLENN
United States Senator

/s/ Dick Armey
RICHARD K. ARMEY
United States
Representative

/s/ Howell T. Heflin
HOWELL T. HEFLIN
United States Senator

/s/ Richard Shelby
RICHARD SHELBY
United States Senator

/s/ Mary Rose Okar
MARY ROSE OKAR
United States
Representative

/s/ Ralph Regula
RALPH REGULA
United States
Representative

/s/ Peter J. Visclosky
PETER J. VISCLOSKY
United States
Representative

/s/ Joe Kolter
JOE KOLTER
United States
Representative

/s/ Martin Frost
MARTIN FROST
United States
Representative

/s/ Jay Rockefeller
JOHN D. ROCKEFELLER IV
United States Senator

/s/ Lawton Chiles
LAWTON CHILES
United States Senator

[PBGC Logo] Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington,
D.C. 20006-1806

Office of the Executive Director

July 2, 1987

The Honorable Ralph Regula
United States Representative
Washington, D.C. 20510

Dear Congressman Regula:

Today, I received your letter of July 1 requesting that PBGC withhold any action that may interfere with the implementation of a new pension benefit arrangement between LTV Steel Corporation and the United Steelworkers of America.

I am pleased to accept your invitation to meet with you to discuss the concerns of the Pension Benefit Guaranty Corporation. The PBGC will contact your offices to set a meeting date that will accommodate your schedule.

I appreciate your interest and concern, and look forward to meeting with you soon.

Sincerely,

/s/ Kathleen P. Utgoff
KATHLEEN P. UTGOFF
Executive Director

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for A Reorganization Under Chapter 11. Case Nos. 86 B 11270 (BRL) Through 86 B 11334 (BRL) and 86 B 11402 (BRL) and 86 B 11464 (BRL)

IN RE: CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*,
Debtors.

APPLICATION IN SUPPORT OF ORDER AUTHORIZING LTV TO ENTER INTO CERTAIN AGREEMENTS AND MAKE CERTAIN PAYMENTS

The LTV Steel Company, Inc. and related debtor companies ("LTV Steel"), submit this application for orders authorizing LTV Steel to enter into agreements or programs and to make certain payments with respect to retired employees. In support of their application, these debtors and debtors-in-possession state:

Introduction

1. On July 17, 1986 LTV Steel and related companies filed Chapter 11 petitions in this Court and were continued in the management and operation of their businesses and properties as debtors-in-possession. As a result of the filing of the Chapter 11 petitions the employees and retirees of LTV Steel experienced uncertainties and hardships. One immediate response was a strike at LTV Steel. LTV Steel concluded that it was essential that it enter into negotiations over provisions in its collective bargaining agreement applicable to union employees and retirees and make certain decisions concerning benefits for non-union retirees in order to ensure labor peace during their Chapter 11 proceedings, to achieve certain efficiencies and

cost savings, and to alleviate to some extent the hardship imposed on active and retired employees. Accordingly, the LTV Steel initiated bargaining with the USWA and after several months their negotiations produced agreements affecting union employees or retirees. Further, decisions affecting non-union retirees were reached. The debtors believe that these agreements and programs will achieve goals beneficial to the debtors, their employees and retirees, and their creditors.

2. LTV Steel therefore seeks the authorization of this Court to enter into agreements and programs and make payments in accordance with these agreements and programs. The principal agreement for which authorization is sought is a collective bargaining agreement, to be effective until the confirmation of an LTV Steel plan, between LTV Steel and the United Steelworkers of America ("USWA") covering designated facilities. The agreement (the "USWA Agreement") is broad in scope and complex in application. The letter agreements and term sheets, which comprise the principal terms of the USWA Agreement, are set forth in the accompanying Exhibit 1.* The USWA Agreement generally serves as a model for the Company's labor agreements with other unions. LTV Steel thus seeks authority to enter into agreements with other unions encompassing comparable terms as set forth in the USWA Agreement. LTV Steel also seeks authority to make certain payments to its non-union retirees pursuant to a program which seeks to provide benefits to non-union personnel comparable to those provided to union personnel. The provisions are set forth in Exhibit 2. Each of these agreements and programs will be described in greater detail below.

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* Copies of the exhibits hereto have been filed with the Clerk of the Court and are being provided to counsel for the official and unofficial committees herein, as well as to the United States Trustee.

The LTV Steel-USWA Agreement

3. The LTV Steel-USWA Agreement in conjunction with certain provisions of the agreement entered into between LTV Steel and USWA in 1986 is designed to create a comprehensive revision of certain terms and conditions of employment for union workers of LTV Steel which will remain in place until the confirmation of LTV Steel's plan of reorganization. The new Agreement will ensure stability in labor relations for the duration of LTV Steel's case, will provide for considerable savings in certain areas, promote an exciting, new approach to labor/management relations, and will relieve some of the hardships on employees and retirees as a result of LTV Steel's Chapter 11 case and the termination by PBGC of pension plans for both active and retired workers. The Agreement also settles outstanding litigation between USWA and LTV Steel which is pending in this Court. The Agreement is therefore very much in the interests of the estate and will enhance the ability of the Company to reorganize.

(a) *History*

4. The recent history of the relationship between LTV Steel and USWA provides a useful context for examination of the USWA Agreement. In 1986 for the first time in approximately 30 years, bargaining in the steel industry was conducted on a company by company basis rather than through an industry coordinating committee. LTV Steel was the first of the major steel companies to negotiate a 1986 agreement. It obtained the most substantial wage and benefit concessions from the USWA, $3.44 per hour, achieved by any of the major steel companies in the 1986 bargaining round. Such concessions were essential to avoid LTV Steel's bankruptcy. However, due to a sudden and significant deterioration in shipments, stagnant prices and contraction of liquidity, shortly after the 1986 agreement was executed, LTV Steel did file a Chapter 11 petition. Upon the filing, LTV Steel was obliged to cease

payment of pre-petition obligations, including obligations to retirees. The cessation of payment of retiree health and life insurance benefits led not only to a potentially crippling USWA strike, days after the Chapter 11 filing, but also to federal legislation, recently extended to September 15, 1987, mandating the continuation of such retiree health benefit programs by Chapter 11 debtors.

5. These events intensified LTV Steel's need to commence bargaining with the USWA to address a broad range of issues between the company and its union work force and retirees. The USWA's interest in bargaining, understandably not great given the concessions recently made in the 1986 negotiations, increased in January, 1987 after the Pension Benefit Guaranty Corporation ("PBGC") terminated the pension plans providing retirement benefits to hourly workers. Thus, negotiations which had been sought by LTV Steel as early as September 1986 began in earnest in the early spring of 1987.

6. The USWA's primary interest was in resolving pension issues. The USWA expressed difficulty with an attempt to negotiate any further reduction in the reduced wage rates established in April, 1986. LTV Steel raised other issues including manning and health insurance costs, as well as retirement benefits. LTV's objective was to reduce its total employment costs while dealing with the hardships caused by the termination of the pension plans. Both sides were aware that alternative routes to a resolution existed, including legal action under the Bankruptcy Code. This alternative might well have caused a strike, however, which would be devastating to the debtor and its creditors. A strike of the ninety-one day duration of the Wheeling-Pittsburgh strike would cost LTV Steel at least several hundred million dollars. Obviously, a strike of the six-month duration of the USX strike would cost much more. Either would jeopardize the reorganization prospects of the Company. Ultimately, both LTV and USWA concluded that both would benefit

if bargaining resulted in an agreement which would ensure stability until confirmation of LTV Steel's plan. Thus, in April 1987 LTV Steel set the stage for bargaining by obtaining this Court's authorization to make a one-time payment to retirees to relieve the immediate hardship caused by the reduction in pension payments as a result of termination of the pension plans, and LTV Steel and the USWA announced their mutual commitment to commence intensive bargaining with the goal of reaching agreement by May 1, 1987. Bargaining commenced and continued with extraordinary intensity and commitment on both sides to resolve the complex issues presented through an unprecedented and innovative restructuring of the labor agreement.

7. A tentative agreement was reached between the Company and USWA negotiators on May 13, 1987. After such an agreement is reached, it is put before the local union presidents for a vote. If the vote is favorable, the agreement is then submitted to the USWA International Executive Board and then the union membership. Unfortunately, when the agreement reached was put before the local presidents on May 14, 1987, the vote was unfavorable. All negotiations ceased, and both sides rescinded their offers.

8. Thereafter, on May 26, 1987, the unions resumed the bargaining process with the Company on a local basis. The Company, at that point, renewed its prior offer. On June 25, the agreement was again put before the local presidents, and this time the vote was successful. The agreement has been recommended by the local presidents and will be presented to the union members for a vote.

(b) *The Agreement*

9. The principal terms of the USWA Agreement are described in the term sheets and letter agreements in Exhibit 1. As noted, the USWA Agreement will govern the relationship between the parties until the confirmation

date of LTV Steel's plan. The effective date of the USWA Agreement varies depending upon the substance. For example, the pension provisions are retroactive to the date of pension plan termination; portions of the retiree insurance component will become effective on October 1, 1987, shortly after the retiree insurance legislation runs out. Negotiation of a post-confirmation agreement will commence 10 days after the filing of a disclosure statement. (The USWA Agreement may be reopened in April of 1990 to permit renegotiation of economic issues if confirmation has not been effected by that date.)

The USWA Agreement will ultimately generate annual savings to LTV Steel, over the 1986 agreement, of approximately $50 million. LTV Steel's total labor cash cost will be about $23 per hour (excluding profit-sharing and stock ownership plan charges), which is comparable to the costs of other major steel companies. LTV's costs are also less than costs of other industries in comparable areas.

10. The USWA Agreement is subject to certain conditions, including approval by this Court and the ratification of the agreement by the membership of the USWA. If the PBGC successfully acts to render economically ineffective any element of the agreement, or take action to reinstate LTV Steel's pension liabilities or to reduce guaranteed benefits, LTV or the union has the right to invalidate the USWA Agreement and reinstate the 1986 agreement, or go back to the bargaining table. Payments to active or retired employees under this USWA Agreement will offset in an equal amount any recipient's equivalent claim asserted against LTV Steel in this case, and will be offset in an equal amount by any equivalent benefit paid to such recipient pursuant to a trust created pursuant to Section 4049 of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1349. When this agreement becomes effective, the USWA will withdraw with prejudice its application to this Court for an injunction requiring certain payments to retirees, *USWA*

v. LTV Steel, Adv. Proc. No. 87-5016A, and its appeal of the orders terminating the two hourly pension plans, Second Circuit Docket Nos. 87-6100, 6102. LTV Steel will agree, for the duration of the USWA Agreement, not to move pursuant to Section 1113 of the Bankruptcy Code to modify the agreements with USWA in effect after the USWA Agreement is approved.

11. The USWA Agreement is comprised of eight principal components. Through negotiations the parties have agreed to a new plan which will cost per year approximately \$71 million. At the same time, the parties addressed other issues—cost-sharing of insurance, job elimination and maintenance craft efficiencies—which ultimately will save approximately \$50 million per year.

(i) *The LTV Steel/USWA Pension Plan*

This component of the USWA Agreement is a qualified, non-guaranteed defined contribution pension plan. LTV Steel believes the change from a defined benefit to a defined contribution plan is significant, as it is essentially funded as earned. The plan provides essentially for a base formula of cents per hour for all employees, except that employees with 15 years or more of service may instead receive a benefit under a percentage formula. This agreement covers active employees and was designed to provide benefits for future service. The annual cost of this plan is estimated at approximately \$31 million.

(ii) *Manning Agreements*

This component of the USWA Agreement commits the parties to a reduction of approximately 500 specified jobs, the annual average cost of each of which is \$40,000. The total savings to LTV Steel will therefore be in the range of \$20 million once the program is fully implemented, although retirement inducement incentives in the first year, scheduled at \$1000 per

year of service up to a maximum of \$25,000, may be expected to eliminate as much as one-half the savings in the first year.

(iii) *Craft Consolidation Agreement*

This component of the USWA Agreement allows LTV Steel to attain a more efficient, highly skilled and flexible craft work force and will, in the future, result in an annual savings of \$12 million. Both this and the manning agreement signal a positive change toward the goal of maximizing the utilization of the workforce.

(iv) *Health and Life Insurance*

Having recognized that insurance cost controls are essential, the parties have agreed on a change in the program which maintains benefit levels but requires contributions by the participants, resulting in an annual savings to LTV of \$20 million. The prior annual cost was \$150 million, so the savings constitutes a nearly 13% reduction.

The USWA Agreement provides that both active and retired employees contribute \$26.82 per month for insurance. The \$7 million which must be contributed by active employees will be paid through a deduction from annual profit sharing due pursuant to the 1986 agreements. If, in a given year, LTV Steel has insufficient profits to permit the deductions, the deductions will be taken from the profit sharing of the next profitable year.

The \$13 million which must be provided by retirees will either be deducted from payments due individual retirees or will be collected directly. Contributions made by retirees may be refunded in certain circumstances to them from profit sharing due active employees in any year in which profits exceed \$200 million.

(v) *Spousal Benefit*

This component of the USWA Agreement provides an insured benefit to spouses of current employees who die in service. Benefits are set at $250 per month until age 60 and $100 per month thereafter for life. Benefits are funded by the purchase of life insurance annuities. The cost of such an annuity will be offset by any amounts due the employee in excess of $3500 under the LTV Steel/USWA pension plan. The cost of this program is estimated at $1.7 million per year.

(vi) *Individual Account Trust*

This component of the USWA Agreement provides benefits to alleviate the hardship caused by the loss of benefits as a result of the termination of the pension plans. The proposed structure for implementation of the program is a non-qualified, pay-as-you-go, conduit trust which is neither a defined contribution nor a defined benefit plan, but which includes useful aspects of each and which falls without the regulatory jurisdiction of any agency except the Department of Labor. The first year cash cost is estimated at $34 million.

There are four categories of participants in this program. First, current retirees will receive a benefit to replace any lost pension benefit which will comprise 90% to 100% of the lost benefit, depending upon how much PBGC is paying the retiree. With each added dollar paid by the PBGC, the percentage paid of the lost pension benefit decreases by 0.25%. The scale is keyed to the hardship of the retire. For example, if the PBGC payment is greater than $560, the retiree gets 90% of the amount lost; if less than $390, 100%.* The first year cash cost is estimated at

* The PBGC may take the position that these payments either permit the PBGC to reinstate the plans or make a concomitant re-

$33.7 million, representing replacement of 92.25% of lost benefits. Second, vested active employees could receive payments which total 75% of benefits lost at plan termination, as well as certain severance benefits under the lump sum severance program. The annual cost of these payments is estimated at less than $1 million per year in the first year and gradually increasing over time. Third, "frozen" participants, of which there are few, who were employees of facilities sold by LTV, will get 75% of benefits lost at plan termination. Finally, the program provides for benefits in the event of future shutdowns of LTV Steel plants. The benefits will total 75% of benefits lost as a result of plan termination.

(vii) *Disability Plan*

This component of the USWA Agreement provides for those with less than thirty years of service as of plan termination disability benefits totaling $900 per month if no Social Security payments are available, or $500 per month if Social Security is available; for those with more than thirty years of service, $400 per month is payable until Social Security is available. In a significant departure from prior agreements, a 75% of earnings cap is placed upon the aggregate of disability payments received from all sources. An employee receiving disability payments may instead elect to receive contributions under the LTV Steel/USWA Pension Plans. The annual cost of the disability plan is approximately $3 million.

duction in its payments to retirees. If the PBGC takes action intended to vitiate the purpose of the USWA Agreement or reimposes pension liabilities on LTV Steel, then LTV Steel or the union may terminate this agreement and reinstate the 1986 agreement, or go back to the bargaining table.

(viii) *Extended Supplemental Unemployment Benefits (SUB)*

The program is designed to provide a weekly benefit to certain affected employees for the period between exhaustion of regular SUB eligibility or benefits and eligibility for retirement in the event of a permanent shutdown or prolonged absence due to layoff or disability. After exhaustion of regular SUB eligibility or benefits, an eligible employee will receive $173 per week of Extended SUB; total SUB benefits can in these circumstances provide income for up to five years.

12. Other agreements, the value of which is not immediately quantifiable but which are likely to be of great future importance to the Company, were also reached. A "Joint Policy Review Committee", which includes the president of LTV Steel and the President of the USWA, has been established. Another agreement reached fosters the growth of participative-high commitment work systems in the Company's plants. These systems, such as the one in place at the LTV Steel-Sumitomo electrogalvanizing facility, is an exciting new approach to workplace management, which has demonstrated greatly enhanced productivity and significantly higher quality of worklife for employees. A third agreement provides for tuition assistance to union workers who wish to apply for jobs requiring improved skills.

13. Finally, several peripheral matters are addressed by the USWA Agreement. Provision is made for the reimbursement of $225,000 in fees for Lazard Freres & Co., investment bankers for USWA, for work relating to the Agreement. A number of letter agreements apply the overall USWA Agreement to specific plans.

14. In *toto*, the USWA Agreement comprises a complex, innovative structuring of the benefits and obligations of LTV Steel and its union work force and retirees. The

USWA Agreement provides ultimate annual savings of $50 million over the 1986 agreement.

The LTV Steel Non-Union Programs

LTV Steel also seeks authority to make pension payments pursuant to the LTV Steel Income Program and to modify the life insurance programs for participants in the terminated Jones & Laughlin and Republic Steel salaried pension plans. The retirees covered by this program retired from LTV Steel or various predecessor companies. LTV Steel believes that it has the right, pursuant to the various plans, to modify the programs of the retirees as follows:

(i) *Individual Account Trust*

As in the USWA Agreement, the proposed income program for non-union retirees also establishes an Individual Account Trust to alleviate the hardship caused by the loss of benefits resulting from the termination of their pension plans. The current retirees covered by the program will receive a benefit to replace any lost pension benefit which will comprise 90% to 100% of the lost benefit subject to a maximum monthly payment of $1,600. If the PBGC payment is greater than $550, the retiree receives 90% of the amount lost; if from $400 to $549, 95%; if less than $400, 100%. The annual costs for this portion of the program would be approximately $7 million.

(ii) *Life Insurance*

In order to reduce costs and save an estimated $4.8 million per year, LTV Steel, has proposed changes in the life insurance benefits for certain of its current, non-union retirees. No longer basing benefits on a percentage of salary at retirement, the new program provides a maximum of $20,000 face value life

insurance for these current retirees until age 66. At age 66 and older, a $5,000 death benefit would be provided. In no instance would a retiree's life insurance benefits be increased under this program.

Conclusion

LTV Steel respectfully requests that this Court authorize the execution of the agreements and programs and the making of the payments described in this application and in the accompanying Exhibits.

Dated: New York, New York
July 8, 1987

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5/13/87

1987 SETTLEMENT AGREEMENT

Whereas, the Union and the Company are aware of the hardships, risks and uncertainties associated with the bankruptcy proceedings, and

Whereas, active employees have made major sacrifices in the past, and

Whereas, thousands of retirees and active employees have suffered hardships as a result of the pension plan terminations, and

Whereas, thousands of retirees have suffered from uncertainty concerning continued medical and life insurance coverage, and

Whereas, the parties seek to protect active employees and retirees against such hardship and uncertainty, and

Whereas, the parties also seek to enhance the Company's ability to reorganize, and

Whereas, as a result of the pension plan terminations, the bankruptcy proceedings and this hardship and uncertainty, the parties have entered into collective bargaining over new collective bargaining agreements including new benefit plans and other modifications to the current agreements, and

Whereas, the parties by entering into this agreement intend for the duration of the bankruptcy proceeding to protect wages, benefits and other contractual provisions and letters of understanding at levels preserved or establisched by this Agreement; therefore,

I. The United Steelworkers of America, ("Union") and LTV Steel Company, Inc. and LTV Steel Tubular Products Company (collectively referred to as "LTV Steel Companies" or "Company") agree that the current labor agreements (for the units covered by this Agreement as identified in

the attached Exhibit A) are incorporated and restated, except as expressly modified herein, to provide new labor agreements dated May 12, 1987:

(List of appendices to be added)

II. Implementation of the terms of this Agreement shall be subject to: (1) approval by the Bankruptcy Court of this Agreement; and (2) ratification of this Agreement by the USWA. The Company shall promptly apply to the Bankruptcy Court for such approval. Any failure of the Bankruptcy Court to approve this Agreement shall not constitute rejection of the 1986 Agreements. Procedures for ratification shall be initiated promptly by the Union and completed as soon as practicable following Court approval. This Agreement will be implemented, upon Bankruptcy Court approval of this 1987 Agreement and ratification by the Union, notwithstanding any appeal of the order of the Bankruptcy Court approving the Agreement. Except as otherwise provided herein, the portions of this Agreement changing the Basic Agreement and the Insurance Agreement as to active employees will be effective upon implementation; the portions of this Agreement changing the Pension Agreement will be effective retroactive to January 13, 1987; the portions of this Agreement changing the Insurance and Pensioners' and Surviving Spouses' Agreement as to retirees will be effective on October 1, 1987; the portions of this Agreement changing the Supplemental Unemployment Benefits Agreement will be effective January 13, 1987; the portions of this Agreement changing the Employee Investment Program (EIP) will be effective according to their terms.

III. In the event for any reason at any time this Agreement or any of its provisions becomes unenforceable, or if the benefits or payments hereunder or

PBGC pension payments made as of May 1, 1987 are not realized on a continuing basis, either party shall have the option to cause the following to occur upon 72 hours' notice:

A. The provisions of the 1986 Agreements, as agreed to and entered into prior to this Agreement, will "snap back" and be in full retroactive and prospective force and effect effective immediately, subject to offset of payments and benefits claimed under those Agreements by any payments and benefits made under this Agreement, and enforceable to the extent otherwise permitted by law notwithstanding the dismissal of any action pursuant to Paragraph VI.

B. The parties will meet for the purpose of negotiating new agreements with alternative methods to provide the beenfits in question on comparable terms and at comparable costs to the Company as the plans and benefits disapproved or unenforceable.

IV. A. No later than ten days after Bankruptcy Court approval of a Disclosure Statement for a Plan of Reorganization, the parties shall meet for the purpose of negotiating a new Agreement. Except as otherwise provided below, this Agreement shall terminate upon the date of entry of an order confirming a plan of reorganization or the date when any stay of the order of confirmation entered by a court of competent jurisdiction expires or is vacated ("expiration date"). Upon such termination either party may resort to economic action.

B. If this Agreement has not terminated pursuant to Section A, either party may give written notice no later than 60 days prior to April 15,

1990 of its desire to renegotiate the economic provisions in this Agreement, and the parties shall meet within 30 days thereafter to negotiate with respect to economic conditions. If the parties fail to reach agreement by April 15, 1990, either party may resort to economic action.

V. A. Any payments or benefits provided to or on behalf of a participant in a pension or benefit plan under this Agreement shall be applied to reduce in an equal amount any equivalent bankruptcy claims encompassing a claim for such payments or benefits upon which distributions would otherwise be required to be made on behalf of such retiree or participant pursuant to the terms of the Company's plan of reorganization in respect to the Company's obligations to such retiree or participant under the Pension or Benefit Agreements.

B. Any payment or benefit paid to or on behalf of a participant in a pension plan by the Trust established pursuant to Section 4049 shall be applied to reduce in an equal amount any equivalent benefit paid under this Agreement.

VI. The Union, following approval by the Bankruptcy Court of this Agreement, the expiration of any time for an appeal from that approval or the ultimate affirmance of the Bankruptcy Court's approval, and ratification by the USWA, agrees to dismiss with prejudice its suit for retirement benefits currently pending in the Bankruptcy Court (Adversary Proceeding No. 87-301A) and its appeals from the District Court's dismissals of the Union's actions to vacate the District Court's orders approving the PBGC's termination of the pension plans (Second Circuit Court of Appeals

Nos. 87-6100, 6102). The Union agrees to seek an immediate stay of the Bankruptcy Court suit and the Second Circuit appeals pending Bankruptcy Court approval of this Agreement, final judicial review of any appeal from the Bankruptcy Court's approval, and ratification by the USWA.

VII. In consideration for the Union's agreement to this 1987 Agreement:

A. The Company agrees to waive and surrender any claim or right it has or might have in the future to seek relief pursuant to 11 U.S.C. Section 1113, hereby acknowledging that this Agreement is in full settlement of any such claim or right.

B. The Company agrees not to seek relief pursuant to 11 U.S.C. Section 1113.

This provision will not be effective if a "snap back" under Section 111A takes place.

Proposal

LTV STEEL INCOME PROGRAM COVERING PARTICIPANTS IN THE TERMINATED J&L AND REPUBLIC SALARIED PENSION PLANS

Effective Date:

October 1, 1986 for participants in the Republic salaried pension plan and January 14, 1987 for participants in the J&L salaried pension plan or as otherwise specified below.

Program Elements:

1. Establish Individual Account Trust

   - Covers retirees (RSC at 9/30/86; J&L at 1/13/87) and current actives with 10 years of service as of plan termination.
   - Covers sold unit employees only if retired prior to plan termination. Sold unit active employees are not covered but will be addressed under separate letter.
   - Provides percent of lost benefit in accordance with hardship scale for current retirees subject to a maximum monthly payment of $1,600.

PBGC Payment	*% of Lost Benefits*
Less than $400	100%
$400 to $549	95%
$550 or more	90%

   - Provides 75% of any lifetime benefit lost by actives with at least 30 years of service at date of Plan termination because of PBGC maximum—retirement and benefit may commence immediately but offset by PBGC benefit amount immediately payable—subject to a maximum monthly payment of $1,600. Retiree insurance coverage provided immediately in accordance with prior plan.

   - Provide 75% of lost benefit to a maximum monthly payment of $1,600 for actives with at least 10 but less than 30 years of service as of Plan termination. Eligibility is as follows:

     —Employees can retire at age 57 with 30 years of service. Payment commences at the later of age 57 or 30 years of service and is offset by PBGC amount immediately payable. Insurance commences upon retirement at age 57 or later except for those attaining 30 years of service prior to 1/1/88 who would be immediately eligible for retiree insurance.

     —Retirement at age 60, with 15 years of service.

     —Shutdown with at least 15 years of service and 55 years of age at date of shutdown or with age plus service at date of shutdown equal to at least 80; provide payment immediately based on accrued benefit. Shutdown with at least 25 years of service and not eligible for above will be eligible to receive payment commencing when 30 years of service would have been attained.

   - Offset by any 4049 trust settlement or a creditor settlement under Chapter 11 reorganization.
   - Offset by any hardship payment.
   - Payments retroactive to date of Plan termination or date of employee's retirement, if later.
   - Subject to approval by the bankruptcy court and appropriate government entities.

2. Pre-retirement Spouse Coverage

   - Provide 50% surviving spouse coverage to a maximum of $800 based on the amount that would have

been payable under this program to the employee at time of death.

—eligibility at 55/10, 30 years of service, age 65.

3. Defined Contribution Plan

- provide for loss of the accrued benefit under the terminated Plan(s) for active non-vested employees by applying the appropriate age related additive shown in the attached table for a period equal to half of recognized service at date of respective Plan termination.

DEFINED CONTRIBUTION PLAN
TEMPORARY ADDITIVE
NON VESTED EMPLOYEES ONLY

Age	Current Contribution	Temporary Additive
L 35	3%	1%
35-39	4%	2%
40-44	5%	3%
45-49	6%	4%
50-54	7%	5%
55-59	8.5%	5.5%
60 & Over	10%	6%

SALARIED RETIREE LIFE INSURANCE

Effective Date: October 1, 1987

Benefit:

Provide a maximum of $20,000 face value life insurance to all current retirees until age 66 is reached. At age 66 and thereafter, a $5,000 death benefit will be provided.

This provision will *not* serve to increase any retiree life insurance benefit currently in force. Thus, currently active salaried employees will continue to have a $5,000 post-retirement life insurance benefit applicable at any retirement eligible age.

LTV STEEL COMPANY
PROGRAM OF INSURANCE BENEFITS

Effective Date January 13, 1987.

Participants

Designated active employees of LTV Steel Company.

Benefit Provisions

The Program of Insurance Benefits in effect on January 12, 1987, except as amended by this document.

Program Eligibility

Employees who are eligible to participate in the Program of Insurance Benefits in effect on January 12, 1987, including effective January 13, 1987, employees eligible to receive benefits under the Disability Income Benefits Program, or under the Extended SUB Program. For employees not yet eligible to participate as of January 12, 1987 and for new employees, eligibility to participate begins upon the completion of 520 hours of actual work with LTV Steel Company.

Participant Contribution

Effective October 1, 1987, a $26.82 per month contribution for health care benefits will be required for each covered employee for either single or family coverage. A payroll deduction of cash contribution will not be collected from employees. However, this contribution will be recovered by the Company in accordance with the provisions of the Employee Investment Program. Any additional contributions required for HMO participation shall remain in effect.

Approval

May be subject to approval by the bankruptcy court.

The above is a summary outline of key features only.

LTV STEEL COMPANY
PROGRAM OF HOSPITAL—MEDICAL BENEFITS FOR ELIGIBLE PENSIONERS AND SURVIVING SPOUSES

Service

Service under the LTV Steel-USWA Pension Plan for retirements of deaths occurring on or after January 13, 1987.

Effective Date January 13, 1987.

Participants

Designated retirees and surviving spouses of LTV Steel Company.

Benefit Provisions

The Program of Hospital-Medical Benefits in effect on January 12, 1987, except as amended by this document.

Program Eligibility

Participants making the required contribution to the Program of Hospital-Medical Benefits who belong to one of the following groups:

A. Participants who are eligible to participate in the Program of Hospital-Medical Benefits for Eligible Pensioners and Surviving Spouses in effect on January 12, 1987. Surviving spouses of such retirees who die after January 12, 1987 are eligible to participate in the Program if eligible for a Surviving Spouse's Benefit under the J&L and Republic Hourly Pension Plans.

B. Participants who receive a distribution from the LTV Steel-USWA Pension Plan with: (1) 15 or more years of service and attainment of age 60,

or (2) under age 60 with 30 or more years of service as of January 12, 1987.

C. Participants who receive a benefit (other than a benefit paid to a Prozen Participant) under the Individual Account Trust.

D. Disabled employees whose eligibilty for Disability Income Benefits ceases as a result of age provided he continues to be totally and permanently disabled.

E. The spouse of a Participant as defined in B. through D. above who dies after January 12, 1987 provided such Participant was eligible for coverage under this Program and provided such spouse would have been eligible for a Surviving Spouse's Benefit under the Prior Plans and was enrolled in the Program as a dependent at the time of the Participant's death.

F. Spouses of employees (except those at sold facilities) who are eligible to receive a Pre-Retirement Surviving Spouse's Benefit.

Participant Contribution

Hospital Benefits and Physicians' Services Benefits—Effective October 1, 1987, a monthly contribution will be required for participation in the Program from each Participant including those enrolled in a Health Maintenance Organization (HMO) in accordance with the following schedule:

Monthly Pension	Monthly Contribution
\$200.00 or less	0
\$200.00-\$226.81	Amount in excess of \$200
\$226.82 or more	\$26.82

In no event will more than one monthly contribution be required from a married couple. The monthly contribution amounts may be subject to refund in ac-

cordance with the provisions of the Employee Investment Program.

Monthly pension includes total amounts or monthly equivalent amounts from the following sources:

- Pension Benefit Guaranty Corporation
- Individual Account Trust
- Pre-Retirement Survivor Benefit under the Program of Insurance Benefits; and
- LTV Steel-USWA Pension Plan

Participants eligible for hospital and physicians' service coverage under any other employer's insurance program, may elect to defer participating in this Program until the other coverage terminates, provided the Company is notified within 30 days of the termination of the other coverage. Proof of coverage and termination of such coverage shall be required by the Company.

HMO Participants will also be required to pay any additional contributions required for HMO participation.

Optional Major Medical Benefits will continue to be available to those who are enrolled in the basic coverages (Hospital Benefits and Physicians' Services Benefits) and make the required monthly contributions for Hospital Benefits and Physicians' Services Benefits and Optional Major Medical Benefits.

Approval

May be subject to approval by the bankruptcy court.

The above is a summary outline of key features only.

Pre-Retirement Surviving Spouse Benefit

Eligibility

A legally married designated employee of LTV Steel Company who died while still accruing service or while eligible to receive benefits under the Disability Income Benefits Plan or the Extended SUB Program, after having completed at least 15 full years of service with the Company. A legally married designated employee who was employed at a former LTV Steel or predecessor facility the employees of which, pursuant to a sale, were no longer earning service for benefit purposes under the Prior Plans as of January 12, 1987, shall also be eligible so long as the individual has completed at least 15 full years of service with the Company and the purchaser. A spouse of such individual will be entitled to benefits only if the individual dies while still accruing service.

Service shall be measured in the same manner as under the LTV Steel-USWA Pension Plan.

An employee who died prior to January 13, 1987 shall not be covered for benefits.

A person will be considered a surviving spouse if immediately after the eligible employee's death, the person is a widow or widower as defined in the Social Security Act, except that where such Act requires reference to the Law of the District of Columbia, the applicable law shall be that of the State of Ohio.

Period of Payment

The benefit shall be payable in monthly installments for the life of the spouse, with the first payment due on the first day of the month immediately following the employee's death, and the last payment due on the first day of the month during which the spouse shall die.

Such period of payment shall be subject to the Offset Provision noted below.

Amount of Payment

Subject to the Offset Provision, the monthly benefit shall be $250 until the month following the month in which the spouse shall reach age 60. After the spouse reaches age 60, and subject to the Offset Provision, the monthly benefit shall be $100.

Amount of Payment For Individual at Sold Facility

The monthly benefit at the death of an individual at a sold facility shall be equal to a fraction of $250 until the month following the month in which the spouse shall reach age 60. After the spouse reaches age 60, the monthly benefit shall be a fraction of $100. No Offset Provision shall apply. The fraction shall have a numerator equal to the individual's service with LTV Steel or its predecessor at the date of sale of the facility. The denominator shall be the individual's service (including the period with the purchaser) at date of death.

Offset Provision

The benefit provided under this program shall be reduced by the amount of monthly lifetime benefit that could be purchased for the spouse with the employee's account balance in the LTV Steel-USWA Pension Plan represented by Company contribution, and earnings, in excess of $3500, as of the last day of the month prior to the month of the death of the employee.

The reduction shall apply regardless of whether the spouse is a named beneficiary under that plan.

If such portion of the account balance is less than $2,000, such deduction shall be the amount of a

single-life annuity calculated by using the UP 1984 mortality table, setback 4 years, and the PBGC immediate annuity rate effective for terminations during the month of January in the year of the participant's death.

Except as provided below, if such portion of the account balance is $2,000 or more such deduction shall be the amount of the largest single-life annuity which could be purchased from an insurance company approved under the LTV Steel-USWA Pension Plan utilizing annuity purchase rates in effect at the date of purchase.

If such offset benefit is less than $100 per month, such reduction shall be made against both the $250 benefit and the $100 benefit.

If such offset benefit is $100 per month or more, the insurance company shall re-determine the amount of the single-life annuity which could be purchased with such portion of the account balance to provide a benefit after age 60 of $100 per month. The resulting re-determined amount prior to age 60 shall be offset only against the $250 benefit and no benefit shall be payable under this program after age 60. If such re-determined amount is $250 or more, no benefit shall be payable under this program.

The benefits described may be subject to the provisions of Section V of the Settlement Agreement.

Insurance Benefit

The monthly benefit payable after applying the Offset Provision shall be paid by an insurance company licensed in New York.

LTV Steel shall select the insurance company from which the benefit shall be paid.

LTV Steel may elect to insure the benefit by the payment of a premium on a [sic] annual basis to provide the benefit or, in the alternative, may purchase a lifetime annuity by payment of a single premium within 90 days after the death of an eligible employee where a benefit is payable. Premiums paid on an annual basis shall be sufficient to provide the lifetime annuity for any deaths occurring during the period for which the premium was paid.

Cost

The entire cost of the program shall be paid by LTV Steel.

Related Benefits

A surviving spouse eligible to receive a benefit under this program will receive benefits as described in the Program of Hospital-Medical Benefits for Pensioners and Surviving Spouses.

The above is a summary outline of key features only.

INDIVIDUAL ACCOUNT TRUST

DEFINITIONS

A "Participant" is an individual who is a Retired Participant, Vested Active Participant, Frozen Participant, Limited Participant, or Special Participant.

A Participant's "Accrued Benefit" shall be the life only monthly benefit that the Participant had earned under the J&L and Republic hourly pension plans (the "Prior Plans") as of January 12, 1987, calculated as if he had voluntarily severed employment at that date.

"Continuous Service" or "Service" consists of service under the Prior Plans which is continuous as of January 12, 1987, plus service under this program. Service under this program shall be measured in the same manner as under the Prior Plans, except that service will continue during the period when a Participant is eligible for benefits under the Extended Supplemental Unemployment Benefits or Disability Income Benefits.

A Participant's "Last Payment Date" shall, for a Participant who had completed at least 15 years of Continuous Service and had attained age 40 both as of January 12, 1987, be the month in which the Participant attains age 62. For all other Participants, Last Payment Date shall be the month in which the Participant attains age 65.

A participant shall "Retire", for purposes of this program, as of the date he specifies he wishes to sever employment and receive benefits, if eligible, under the program. In no event shall a Participant Retire later than the date benefits are payable under LTV Steel-USWA Pension Plan, nor earlier than the day following the last day for which he earns wages from the Company.

RETIREES

A "Retired Participant" is an individual (including the spouse of a deceased employee) who was receiving a monthly pension under the Prior Plans as of January 12, 1987. A Retired Participant shall also include the surviving spouse or co-pensioner entitled to receive a monthly benefit after the death of a Retired Participant. A Participant who became totally and permanently disabled prior to January 13, 1987 and who subsequently becomes eligible to receive a disability benefit from the Pension Benefit Guaranty Corporation ("PBGC"), or a retired employee who was not receiving a monthly benefit as of January 13, 1987 because he had received a special payment in lieu of a pension for January 1987 shall also be a Retired Participant.

Payments to Retired Participants

Subject to the following limitations, if the monthly benefit paid to a Retired Participant by the PBGC is less than the monthly benefit that was being paid to the Retired Participant under the Prior Plans, the Retired Participant shall be entitled to a monthly payment under the program.

The amount of monthly benefit payable under this program shall be a percentage of the difference between the benefit that was being paid under the Prior Plans and the amount paid by the PBGC. Such percentage shall be as follows:

Amount Paid by PBGC	Percentage
0-\$390	100.00%
\$391	99.75%
\$392	99.50%
.	.
.	.
.	.
Increasing by \$1	Decreasing by 0.25%
.	.
.	.
.	.

Amount Paid by PBGC	Percentage
$410-$540	96.00%
$541	94.75%
$542	94.50%
.	.
.	.
.	.
Increasing by $1	Decreasing by 0.25%
.	.
.	.
.	.
$560 and over	90.00%

If a Retired Participant's monthly benefit under the Prior Plan would have decreased at some future date (due to attainment of age 62 or age 65 if a supplement had been payable under the "70/80" or Rule-of-65 provisions of the Prior Plans, or otherwise), such reduced monthly benefit shall be utilized in the preceding paragraph after such date. If, after such adjustment, the benefit being paid by the PBGC is identical to (or larger than) the amount that would have been payable under the Prior Plans, no further payments shall be made to the Retired Participant under this program.

Except as provided below, the first payment under the program shall be for February 1987. Future payments shall be made as of the 15th day of the month for that month. Payments for months prior to August 1987 shall be combined and paid in a lump sum, after reflecting the reduction for the "hardship payment" made in April 1987, as soon as practical after the ratification of the Settlement Agreement.

The first payment under the program for a Participant who became totally and permanently disabled prior to January 13, 1987, and who subsequently becomes eligible to receive a disability benefit from the PBGC shall be paid for the month following the month in which the Participant retired.

For an employee who retired in November or December 1986 or in January 1987 and who received a special payment, the first payment under the program shall be for the fourth month following the month of retirement.,

Except as indicated in the next two paragraphs, any prospective adjustment in payments made by the PBGC shall be reflected prospectively in the program. Any retroactive adjustment in payments by the PBGC shall also be reflected retroactively in the program. Such prospective or retroactive adjustment shall be made by substituting the revised PBGC amount in the calculation above.

If a Retired Participant was receiving a reduced pension under the Prior Plans as of January 12, 1987, due to a Worker's Compensation offset, the following additional clarification shall apply. For purposes of determining the amount of benefits payable by the PBGC, the net amount of benefits (after recognizing the Worker's Compensation offset) shall be utilized. The sum of (1) the benefits payable by the PBGC, (2) the amount, if any, payable under this program, and (3) the amount of Worker's Compensation shall not exceed the gross benefit payable under the Prior Plans unless Worker's Compensation alone exceeds that amount.

If the Participant was receiving a Rule-of-65 retirement under the Prior Plans and is not yet eligible for Social Security, the portion of the benefit payable hereunder arising because of the Increased Pension—Rule-of-65 provision under paragraph 3.5 of the Prior Plans shall be subject to a modified version of the reduction provision contained in such paragraph in respect to excess earned income. Such modificaton shall utilize a $6000 threshold.

If at the time of the death of a Retired Participant a monthly pension payment would have been payable under the Prior Plans to his spouse or co-pensioner, such spouse or co-pensioner shall also be eligible for monthly benefits under this program. The amount of monthly benefit payable to such spouse or co-pensioner after the death of the Retired Participant shall be the equal to the same percentage of the difference, if any, between the benefit that would have been paid under the Prior Plans and the amount paid by the PBGC to such spouse or co-pensioner as would have applied had such spouse or co-pensioner been a Retired Participant as of January 12, 1987.

MODIFIED "30 AND OUT" AND "60/15"

A "Vested Active Participant" is a designated employee of LTV Steel Company who was accruing Continuous Service under the Prior Plans as of January 12, 1987 and whose Continuous Service as of January 12, 1987 was at least 10 years, but less than 30 years. An employee who had attained age 60 as of January 12, 1987, and whose Continuous Service at January 12, 1987 was at least 15, but less than 30, years shall be excluded unless such employee retires before attaining age 62 and at retirement has at least 30 years of Continuous Service.

A Participant's "Earliest Commencement Date" shall be the later of (1) the month following the month in which he completes 30 years of Continuous Service or (2) the month following the month when he attains the age indicated below, based upon his completed years of Continuous Service at January 12, 1987.

Completed Years of Continuous Service At January 12, 1987	Age
29	50
28	51
27	52
26	53
25	54
24	55
23	56
22 or less	57

Payments to Vested Active Participants

If a Vested Active Participant Retires after completing 30 years of Service and prior to his Last Payment Date, a monthly benefit shall be payable from this program. Such monthly benefit shall be paid from the later of (1) the Participant's Earliest Commencement Date or (2) the month following the month in which the Participant Retires. It shall be discontinued as of the earlier of (1) the month preceding the month the Participant reaches his Last Payment Date, or (2) the month in which the [remainder of sentence illegible].

If a Vested Active Participant Retires after reaching age 60 but before age 65 with 15 but less than 30 years of Service, a benefit will be payable only if such Participant either was less than age 40 at January 12, 1987, or had less than 15 years of Continuous Service at that date, or both. Such benefit shall be payable from the month following the month in which the Participant Retires. It shall be discontinued as of the earlier of (1) the month preceding the month the Participant reaches his Last Payment Date, or (2) the month in which the Participant dies.

Except as provided in the next paragraph, the benefit payable to a Vested Active Participant shall be equal to 75% of such Participant's Accrued Benefit if such monthly benefit becomes payable for retirement in accordance with either of the two preceding paragraphs.

If the Participant has 15 but less than 30 years of Service at date of retirement, such benefit shall be reduced by 8/12 of 1% for each month, if any, by which the commencement date of the benefit precedes the month in which the Participant reaches age 62.

LIFETIME SUPPLEMENTARY BENEFITS

A "Limited Participant" is a designated employer of LTV Steel Company who was continuing to accrue Continuous Service under the Prior Plans as of January 12, 1987; and has completed at least 10 years of service as of January 12, 1987; and whose ultimate lifetime benefit payable by the PBGC is less than his Accrued Benefit as of January 12, 1987 under the Prior Plans due to the "phase-in rules" of ERISA Section 4022(b)(7) or to the maximum benefit limitations of ERISA Section 4022(b)(5). A Vested Active Participant or Special Participant may also be a "Limited Participant".

Payment to Limited Participant

The monthly benefit payable to a Limited Participant shall be equal to 75% of the difference between the Limited Participant's Accrued benefit and the "unreduced monthly benefit payable by the PBGC".

The "unreduced monthly benefit payable by the PBGC" shall be determined in the following manner:

If the Limited Participant had at least 30 years of Service at January 12, 1987, the [remainder of sentence illegible].

If the Limited Participant had at least 15 but less than 30 years of Service and had attained

age 40 at January 12, 1987, the actual lifetime benefit that would be payable to the PBGC at the later to occur at age 62 or actual date of retirement.

If the Limited Participant had at least 15 but less than 30 years of Service and had attained age 40 at January 12, 1987, the actual lifetime benefit that would be payable by the PBGC at the later to occur of age 62 or actual date of retirement.

In all other cases, the actual lifetime benefit that would be payable by the PBGC at the later to occur at age 65 or actual date of retirement.

The monthly benefit payable to a Limited Participant shall commence as of the later of (1) the month including the date as of which the unreduced monthly benefit payable by the PBGC commences or (2) the month following the month in which the Participant Retires. Such benefit shall be payable for the lifetime of the Limited Participant.

SHUTDOWN AND LONG TERM LAYOFFS

A Participant's "Date of Service interruption" shall be the first day the Participant is eligible (or would have been eligible, but for the Participant having at least 30 years of Service) for extended SUB benefits ("Extended SUB").

If a Vested Active Participant who incurs a Date of Service Interruption was not offered Suitable Long Term Employment (as defined in Section 1 of Appendix A of the Prior Plans) during the period, if any, of his eligibility for Extended SUB while he was under age 55 and his combined age and Service was less than 60, he shall be entitled to a monthly benefit. Such monthly benefit shall commence as of the month following the month in which his eligibility for Extended SUB ceases. If such Vested

Active Participant had completed at least 30 years of Service, benefits shall commence as of his Date of Service Interruption. Such benefit shall be payable to the earlier of (1) the month preceding the month the Participant reaches his Last Payment Date or (2) the month in which the Participant dies. The monthly benefit shall be $750, unless such Participant either had completed at least 30 years of Service or would have completed 30 years of Service within five years following his last day worked. In such event, the benefit shall be the larger of $750, or 75% of his Accrued Benefit plus $300. The $300 amount shall be subject to reduction, prior to eligibility for Social Security, for excess earned income, but only if the Participant was under age 55 and the sum of his age plus Service was less than 80 as of the date benefits commenced hereunder. Such reduction shall be at the annual rate of $1 for each $2 of earned income in excess of $6000 in any calendar year. Such reduction shall be administered in a manner analogous to paragraph 3.5 of the Prior Plans. Notwithstanding the foregoing, if the monthly benefit in any event will continue beyond the date when the Participant attains age 62, at that date the monthly benefit will be reduced by $300.

If a Vested Active Participant shall be entitled to a monthly benefit under more than one provision, only one monthly benefit shall be payable. Such monthly benefit shall be the largest benefit. Any benefits payable to a Limited Participant shall be in addition to benefits payable to a Vested Active Participant.

If a Vested Active Participant (who received benefits under this program after a Date of Service Interruption) is re-employed and subsequently again restires, the benefits, if any, to which he is entitled hereunder shall be determined based solely on

whether he has experienced a second Date of Service Interruption.

A "Special Participant" is a designated employee of LTV Steel Company who was continuing to accrue Continuous Service under the Prior Plans as of January 12, 1987; whose Continuous Service was at least 30 years as of January 12, 1987; and who reaches his Date of Service Interruption prior to attaining age 62.

Payment to Special Participants

The monthly benefit payable to a Special Participant shall be equal to $300.

The monthly benefit shall be paid from the month following the month the Special Participant reaches his Interruption of Service Date to the earlier of (1) the month preceding the month the Participant attains age 62 or (2) the month in which the Participant dies.

EMPLOYEES AT SOLD FACILITIES

A "Frozen Participant" is designated individual who was part of a former LTV Steel or predecessor facility the employees of which, pursuant to a sale, were no longer earning service for benefit purposes under the Prior Plans as of January 12, 1987. A Frozen Participant must also have been continuing to earn Service for eligibility purposes under the Prior Plans as of January 12, 1987 and must have completed at least 10 years of Service at date of retirement. A Retired Participant cannot also be a Frozen Participant.

Payments to Frozen Participant

Benefits shall be payable to a Frozen Participant in a manner analogous to those payable to a Vested Active Participant subject to the following clarifications.

If a Frozen Participant had less than 10 years of Service as of January 12, 1987, it is probable that no benefits will be payable by the PBGC on his behalf. In such event, such Participant will be entitled to lifetime benefits hereunder provided he had completed at least 10 years of Service when he severs employment with the successor employer. If such Participant had at least 30 years of Service at the time of such severance, he shall be entitled to benefits commencing with the later of (1) the Frozen Participant's Earliest Commencement Date or (2) the month following the month of such severance. If such severance occurs after reaching age 40 and completing 15 years of Service but before completing at least 30 years of Service, he shall be entitled to benefits commencing with the later of the month following the month he (1) attains age 62 or (2) severs employment. If such severance occurs before either reaching age 40 or completing 15 years of Service, or both, he shall be entitled to benefits commencing with the later of the month following the month he (1) attains age 65 or (2) severs employment. Such benefits shall be equal to 75% of his life only benefit earned under the Prior Plan at the date of sale of the facility. A Frozen Participant who severs employment with less than 30 years of Service may elect to begin benefits at age 60 or later. Such benefits shall be reduced by 8/12 of 1% for each month by which the commencement date of benefits precedes the appropriate date indicated in the preceding sentences.

Because "phase in" rules of ERISA Section 4022 (b) (7) may apply for Frozen Participants, and because benefits may be in excess of the maximum benefits of ERISA Section 4022 (b) (3), the ultimate level of PBGC benefits may be less than a Frozen Participant's life only benefit earned under the Prior Plan at date of sale of the facility. In such event,

75% of the difference between such benefit and the unreduced monthly benefit, if any, payable by the PBGC shall be paid for the lifetime of the Frozen Participant. The commencement date of such benefit shall be the later of date of retirement or age 62 if the Participant had at least 15 years of service recognized by the PBGC. If the Participant had less than 15 years of service recognized by the PBGC, the commencement date shall be the later of date of retirement or age 65.

Temporary benefits may also be payable to a Frozen Participant. Eligibility for such temporary benefits shall be calculated in a manner analogous to Vested Active Participants, except that no benefits occurring at a Date of Service Interruption shall be payable.

DATE OF PAYMENT

Monthly benefits shall be paid as of the 15th day of the month for which it is payable. Subject to the more specific provisions applicable to Retired Participants, payments for months prior to August 1987 shall be combined and paid in a lump sum as soon as practical after ratification of the Settlement Agreement.

SPOUSE'S BENEFITS

A Participant, excluding a Retired Participant, may elect to provide a benefit payable to the Participant's Spouse in the event the Participant dies while benefits are being provided hereunder. Such spouse's benefits shall be subject to the following requirements:

- No spouse's benefit shall be payable unless elected by the Participant on a written form provided by the Company.

- Any such election shall be irrevocable and must be returned to the Company within a period beginning the date benefits commence (or, if later, the day after ratification of the Settlement Agreement) and continue for 60 days.
- No benefit shall be payable unless the Participant dies after the first monthly benefit is paid to the Participant.
- Unless the Participant is a Limited Participant, the spouse's benefit shall be payable only for the months when a monthly benefit would have been payable to the Participant had the Participant not died.
- The amount of the spouse's payment shall be 50% of the reduced monthly benefit that would have otherwise been payable to the Participant had the Participant not died.
- The spouse's payment shall not be payable to any other person after the spouse's death.
- The spouse's benefit, if elected, shall result in a permanent reduction in the benefit otherwise payable to the Participant. Such reduction shall be 1/24th of 1% multiplied by the number of months that benefits will be payable to the Participant, if the Participant survives, under the program. Notwithstanding the foregoing, such reduction shall be 12% if the Participant is a Limited Participant, or a Frozen Participant entitled to lifetime benefits. Such reduction shall not exceed 3% for any other Participant.

NON-DUPLICATION

No benefit shall be payable under the program while the Participant is receiving benefits under the SUB

or Extended SUB Program, or under the Disability Income Plan, nor shall any benefit be payable for any month during which the Participant is re-employed by LTV Steel or other subsidiaries of the LTV Company. No benefit shall be payable under the program to an employee receiving Worker's Compensation if contributions are also being made on his behalf to the LTV Steel-USWA Pension Plan for that month.

REDUCTIONS

Notwithstanding the other provisions of this program, any benefits otherwise payable under this program to a Participant other than a Retired Participant shall be reduced, on a dollar for dollar basis, by (1) any benefits received by the Participant from Worker's Compensation; (2) any benefits from any "qualified" retirement plan for a period of Service which is also recognized in calculating the Participant's Accrual Benefit; and (3) any severance allowance payable by the Company. Such reduction shall be made for each month when such duplicate benefits are payable.

OFFSET

The benefits described may be subject to the provisions of Section Y of the Settlement Agreement.

EMPLOYMENT AT SOLD FACILITIES

Unless agreements related to the sale provide that an individual may not retire under the Prior Plans (or under this program if the sale is subsequent to January 12, 1987) while employed by the successor employer, a Participant who is employed by a facility which has been sold by LTV, LTV Steel, or its predecessor or successor companies shall be eligible to receive benefits hereunder, provided the Par-

ticipant meets the eligibility requirements hereunder, even if the Participant remains employed by the purchaser. Notwithstanding any other provision of this program, all benefit calculations with respect to such Participant shall be based on the assumption that the PBGC will pay benefits at the same time and in the same amounts as if the Participant had then retired directly from the Company.

MAXIMUM BENEFIT

No benefit payable under this program will exceed $1,200 per month.

COST

The entire cost of the program shall be paid by the Company.

FUNDING

The Individual Account Trust Program shall be provided through a trust established to fund an excess benefit non-qualified money purchase plan. The Company will make contributions monthly, or less frequently in advance, to fund the benefits provided through the program. Such contributions shall be made to the individual account established for each Participant.

APPEALS PROCEDURE

If any difference shall arise between the Company and any designated employee who shall be an applicant for a benefit, or to whom a benefit shall be payable, as to such designated employee's right to a benefit or the amount of his benefit and agreement cannot be reached between the Company and a representative of the International Union, such question shall be referred to the Board of Arbitration established under the Basic Agreement applicable to pro-

duction and maintenance employees in the basic steel operations of the Company; provided however, that the President of the International Union (or his designee) has given written approval of such referral. The Board of Arbitration shall have authority only to decide the question pursuant to the provisions of this program applicable to the question, but it shall not have authority in any way to alter, add to or subtract from any of such provisions. The decision of the Board of Arbitration on any such question shall be binding on the Company, the Union and the designated employee. If any difference shall arise between the Company and any person who shall be or claim to be a co-pensioner or a surviving spouse, as to such person's right to a benefit under this program or the amount of such benefit, such difference shall be resolved by the Company and a representative of the International Union.

If such difference is not so resolved, it may, by written agreement to the Company and the President of the International Union (or his designee), be referred to the Board of Arbitration described above, which shall have authority as described above with respect to such difference, and if it is so referred, the decision of the Board of Arbitration shall be binding on the Company, the Union and such person.

APPROVAL

The Individual Account Trust is subject to approval by the bankruptcy court and may be subject to approval by appropriate government entities.

The above is a summary outline of key features only.

6/30/87

LTV STEEL COMPANY
DISABILITY INCOME BENEFITS FOR ACTIVE EMPLOYEES

PURPOSE

To provide disability income benefits (DIS) to employees who become totally and permanently disabled while employed by LTV Steel Company.

EFFECTIVE DATE January 13, 1987.

ELIGIBILITY

Employees who belong to a group as designated by the Company.

SERVICE

Service shall be measured in the same manner as under the LTV Steel-USWA Pension Plan.

BENEFIT ELIGIBILITY

An employee will be eligible for benefits if he has, or will attain before a break in service occurs, fifteen years of continuous service, and was totally and permanently disabled for five consecutive months due to:

(a) a nonoccupational disability arising on or after January 13, 1987; or

(b) an occupational disability, except that, if an employee had fifteen or more years of continuous service on January 12, 1987, application for a permanent incapacity retirement must have been denied by the Pension Benefit Guaranty Corporation.

A break in service shall be considered to occur on the 2nd anniversary of a continuous period of absence from his last day worked.

BENEFIT COMMENCEMENT

It will be necessary for the employee to make application for benefits and such application must be approved by the Company. Benefits are payable beginning on the latest of:

(1) the date of application,

(2) the date benefits are requested to commence by the employee,

(3) the end of the period that Sickness and Accident Benefits are applied for and paid under the Program of Insurance Benefits or

(4) the end of a period equal to a period of any unused vacation.

DEFINITION OF DISABILITY

An employee is considered to be totally and permanently disabled if he has been totally disabled due to bodily injury or disease so as to be unable to engage in any employment of the type covered by the Basic Agreement and, the disability will, in the opinion of a qualified physician, be permanent and continuous during the remainder of his lifetime.

Disability incurred while the employee was engaged in or resulting from a criminal enterprise, or resulting from future military service which prevents him from return to work with the Company and for which he receives a military pension shall not entitle an employee to DIB benefits.

The continuation of total and permanent disability may be verified by medical examination at any reasonable time during the period that benefits are payable under the DIB Program or under the option to have contributions made to the LTV Steel-USWA Pension Plan.

DISPUTES

If any difference shall arise between the Company and any employee as to whether such employee is or continues to be totally and permanently disabled within the meaning of the above definition, such difference shall be resolved as follows:

> The employee shall be examined by a physician appointed for the purpose by the Company and by a physician appointed for the purpose by a duly authorized repersentative of the International Union. If they shall disagree concerning whether the employee is totally and permanently disabled, that question shall be submitted to a third physician selected by such two physicians. The medical opinion of the third physician, after examination of the employee and consultation with the other two physicians, shall decide such question. The fees and expenses of the third physician shall be shared equally by the Company and the Union.

Disputes regarding eligibility for Disability Income Benefits other than whether an employee remains totally and permanently disabled or the amount of monthly benefits will be resolved by the Union and the Company. If the dispute cannot be resolved, it may be submitted to arbitration upon written approval of the International Union.

BENEFIT AMOUNT

For employees who had less than 30 years of service as of January 12, 1987, the basic benefit is $900 per month if the disabled employee is not approved for Social Security benefits. It is $500 per month if the disabled employee is approved for Social Security benefits.

For employees who had 30 or more years of service as of January 12, 1987, the basic benefit is $400 if

not approved for Social Security benefits. If approved for Social Security benefits, there is no DIB benefit for such employees.

The basic benefit will be reduced to an amount which when added to:

- Social Security benefits,
- Workers' Compensation, Occupational Disease or similar statutory law (except fixed statutory payments for the loss of, or 100% loss of use of, any bodily member or a benefit in the nature of an annuity, pension or payments of similar kind by reason of any laws),
- benefits payable by the PBGC,
- pensions and annuities to which the Company shall have directly or indirectly contributed (except the LTV Steel-USWA Pension Plan and the Employee Investment Program),
- other disability payments to which the Company shall have directly or indirectly contributed,

will not exceed 75% of base earnings (the standard hourly wage rate plus incentives of the employee's incumbent job as of the date of disability or of any higher paid job in which the employee worked at least 1,000 hours in the calendar year immediately preceding the year of disability on a monthly basis using 173.3 hours. For covered occupational disabilities existing on the Effective Date, the employee's incumbent job will be used to calculate the 75% income maximum unless Company records exist which verify that the employee worked at least 1,000 hours in higher paid job in the calendar year immediately preceding the year of disability.

The DIB Program benefit payable to a disabled employee will be recalculated annually based on current

year base earnings for the incumbent job which the employee held as of the date of disability or any higher paid job in which the employee worked at least 1,000 hours in the calendar year immediately preceding the year of disability and on current year payments from Company sources described above, Social Security benefits and occupational disability benefits. If the employee's incumbent job is eliminated, the current year standard hourly wage rate for the employee's Job Class will be used to calculate the 75% income maximum.

Monthly payments for the first and last month that DIB benefits are payable will be adjusted as follows:

- For the first month the benefit as determined above will be multiplied by a factor equal to A divided by B where

  A equals the number of days from the date that the DIB benefit is first payable to the end of the month and

  B equals the number of days in the month.

- For the last month the benefit as determined above will be multiplied by a factor equal to C divided by D where

  C equals the number of days from the first of the month to the date the DIB benefits cease and

  D equals the number of days in the month.

The Program assumes that an employee is approved for Social Security benefits unless he informs the program that he has applied for and been denied such benefits and provides a copy of the application to Social Security and the disapproval letter. In addition, the program may require that an employee appeal any Social Security denial, including appeal to an Administrative Law Judge.

In those instances in which an appeal of a Social Security denial is required, the Company will provide assistance in the preparation of the appeal. In addition, the Plan will pay reasonable lawyer's fees for the employee when it requires an appeal to an Administrative Law Judge.

BENEFIT PAYMENT PERIOD

Benefits cease as of the earliest of; attainment of age 62, the date the employee ceases to be totally and permanently disabled or the date of death.

For employees who become disabled after attainment of age 58 benefits can continue past age 62 as follows:

AGE AT DISABILITY	LENGTH OF BENEFIT
58	4½ years
59	4 years
60	3½ years
61	3 years
62	2½ years
63	2 years
64	18 months
65 or older	1 year

For those disabled due to an occupational disability on the Effective Date, age at the Effective Date will be substituted for age at disability (if current age is higher than 57). Length of benefits will be measured from date first eligible for DIB.

UNDERPAYMENTS AND OVERPAYMENTS

If the amount of the DIB Program benefit paid in any month is more or less than the amount determined in accordance with the Benefit Amount provisions, there will be a retroactive adjustment in the amount of DIB benefits, with repayment by the employee of any overpayment or payment to the employee of any underpayment. The employee will be

required to give any necessary authorization to permit deduction of any such overpayment from any amounts payable to the employee by or on behalf of the Company, including benefits (other than health care benefits), wages, pension and Individual Account Trust payments.

OPTION TO HAVE CONTRIBUTIONS MADE TO THE LTV STEEL PENSION PLAN

An employee who is eligible for benefits under the DIB Plan due to an occupational disability, will have the option to elect to have Company contributions made on his behalf to the LTV Steel-USWA Pension Plan in any month in which he is entitled to receive benefits under the DIB Program.

DIB benefits will not be payable during any month in which such option is in effect.

FUNDING

The DIB program will be provided through a separate Trust established under Code Section 501(c)(9) to which the Company will make contributions determined on the basis of annual actuarial valuations using generally accepted methods and reasonable acturial assumptions. Acturial valuations are to be performed by an actuary designated by the Company. Actuarial assumptions and methods are subject to review and agreement by an actuary designated by the Union. If the Company's and the Union's actuaries cannot mutually agree on actuarial assumptions and methods, the question shall be decided by a third actuary selected by mutual agreement of the Company and the Union. The fees and expenses of the third actuary shall be shared equally by the Company and the Union.

Contributions shall be made on a monthly basis to the Trust by the Company. The first contribution

shall be due to the Trust within 30 days of ratification of the Settlement Agreement. Such contribution shall be in a lump sum for the period from the Effective Date through the month for which the payment is being made. Until the first valuation is completed, the monthly contribution shall be $260,000. Monthly contributions shall continue based on the last completed valuation until the new annual valuation is completed. Any change in contribution required by that subsequent valuation will be effective retroactively to the first day of the plan year for which the valuation is prepared.

Notwithstanding the foregoing, as soon as practicable after the end of a plan year and after completion of the valuation as of the first day of the next plan year, the Company shall make any additional contribution required to fully fund the liability for benefit payments to employees who are disabled as of year end, unless the Company and the Union mutually agree to an alternative procedure. If the trust's assets at year end exceed such liability, the Company may discontinue monthly contribution until such excess has been fully recognized.

RELATED BENEFITS

Disabled employees will receive benefits as defined under the Program of Insurance Benefits for Active Employees, excluding Sickness and Accident Benefits.

Disabled employees are not entitled to contributions on their behalf to the LTV Steel-USMA Pension Plan while receiving benefits under the DIB Program except as allowed under the option in the DIB Program.

Disabled employees are not entitled to benefits from the Individual Account Trust while receiving benefits under the PIB [sic] Program (including contribu-

tions to the LTV Steel-USMA Pension Plan under the option in the DIB Program).

The benefits described may be subject to the provisions of Section V of the Settlement Agreement.

APPROVAL

The LTV Steel Company Disability Income Benefits Program may be subject to approval by the bankruptcy court and appropriate entities.

The above summary outline of key features only.

6/30/87

LTV Steel Company

Extended Supplemental Unemployment Benefits (SUB)

Purpose

In the event of permanent shutdown or prolonged absence due to layoff or disability provide a weekly benefit to certain affected employees for the period between exhaustion of regular SUB benefits and eligibility for retirement.

Effective Date

January 13, 1987 for shutdowns or for any break in service due to layoff or disability on or after that date.

Participants

Designated employees of LTV Steel Company.

Service

Service shall be measured in the same manner as under the LTV Steel-USMA Pension Plan.

Benefit

$173.00 for each full week of elibibility. Benefits for weeks that include receipt of state unemployment benefits, other compensation, or Trade Readjustment Allowance shall be adjusted to the lower of $173.00 or the result of a regular SUB weekly benefit calculation as determined in 1.0.a. and b.

Benefit Eligibility

Eligibility conditions of current SUB program apply during period of extended SUB with the following modifications:

An employee absent from work because of a shutdown must have a minimum as of the date

of shutdown or as of the last day worked if later of: age 55 with 15 years' service; age 50 with 20 years' service; or 25 years' service. However, an employee will not be eligible if his last day worked was more than two years prior to the date of shutdown.

Employee absent from work for two continuous years due to disability or layoff other than shutdown must have a minimum as of the last day worked of: age 55 with 15 years' service; age 50 with 20 years' service; or, 25 years' service.

An Employee whose layoff or disability commenced before January 13, 1987 shall be eligible for benefits if, as of the second anniversary of the date the layoff or disability commences, the Employee has a minimum of age 55 with 15 years' service; 25 years' service; or age 50 with 20 years' service provided that the employee shall have had 20 years' service as of the last day worked. However, an employee will not be eligible if his last day worked was more than two years prior to the Effective Date.

Employee absent from work due to layoff other than shutdown for 104 weeks during a period greater than 104 weeks but not to exceed 142 weeks (provided that such period shall begin no earlier than September 1, 1987 and shall start with the first week of layoff) must have a minimum as of the final last day worked in the 142 week period of: age 55 with 15 years' service; age 50 with 20 years' service; or, 25 years' service.

Employees with 30 or more years service are excluded from extended SUB.

Employee must be less than age 62 if eligible for an unreduced PBGC benefit at age 62. An

employee who had not, as of January 12, 1987, both attained age 40 and completed 15 years of service shall retain benefit eligibility to age 65. An employee, (1) who shall have had at least 20 years service as of his last day worked, (ii) who, as of the date of exhaustion of regular SUB, has not attained the age of 55 years, and whose combined age and years of continuous service shall equal 65 or more but less than 80 at the time an offer of SLTE is made (as that term is defined in Section 1 of Appendix A of the Prior Plans) and who refuses an offer of SLTE after Extended SUB coverage has commenced, shall not be eligible for a weekly benefit effective with the date of such refusal.

Extended SUB benefits follow exhaustion of regular SUB weekly benefits. Any remaining regular SUB credit units are canceled at the end of two years following the last day worked or the end of the period up to 143 weeks for employees on layoff other than shutdown for 104 weeks during the 142 week period.

Benefit Duration

Extended SUB benefits are payable for a maximum of five years from last day worked which includes any period of regular SUB eligibility.

The five year period shall be extended for those employees who are on layoff other than shutdown, for 104 weeks during a period greater than 104 weeks but not to exceed 142 weeks. The extension shall be the number of weeks the employee works during the 142 week period following the initial last day worked of the 142 week period.

Funding

Extended benefits are provided through SUB Plan trust fund.

Financing

Extended benefits will be paid from a separate class of advance benefit, and are to be recovered from the monthly (financial) obligation whe the financial position attains 100%.

Recovery of extended SUB advances shall not reduce the financial position of the SUB Plan below 50%.

Related Benefits

Active insurance will be continued during any month when the employee is entitled to Extended SUB benefits.

Benefit Offset

The benefits described may be subject to the provisions of Section V of the Settlement Agreement.

Approval

May be subject to approval by the bankruptcy court and appropriate government entities.

The above is a summary outline of key features only.

Lump Sum Severance Program

Eligibility

Any designated employee of LTV Steel Company (including a former employee of LTV Steel or a predecessor employer whose employment was terminated pursuant to a sale under a "lock and freeze" agreement) who retires after January 12, 1987 and is entitled to a benefit under the Individual Account Trust for one of the following reasons:

- Retirement after at least 30 years of service, including the period under SUB or extended SUB, excluding employees who had completed at least 30 years of service at January 12, 1987, except as indicated in the next subparagraph; or
- Retirement where a lifetime benefit is payable under the Individual Account Trust; or
- Retirement at age 60 or older, with at least 15 years of service, provided the employee had either not reached age 40 at January 12, 1987, or not completed at least 15 years of service at that date, or both.

An employee whose benefit is payable under the Individual Account Trust after eligibility for 60 months of SUB and extended SUB shall not be eligible for a lump sum benefit unless he had completed at least 30 years of service at the date of expiration of such SUB and Extended SUB or unless the employee is entitled to a lifetime benefit under the Individual Account Trust.

An employee who previously received a "Special Payment" under the J&L or Republic hourly pension plans ("the Prior Plans") shall not be eligible under the program.

A re-employed individual who receives a payment under the program shall not be eligible for a second payment under the program.

Service

Service as defined under the LTV Steel-USWA Pension Plan.

Time of Payment

The benefit shall be paid within 30 days after commencement of benefits under the Individual Account Trust.

Form of Payment

A lump sum from general corporate assets.

Amount of Payment

An employee entitled to receive only a temporary benefit under the Individual Account Trust shall receive a lump sum equal to 1.5 multiplied by 75% of his Accrued Benefit (as calculated as of January 12, 1987 under the Prior Plans), such product multiplied by the number of years such benefit is payable under the Individual Account Trust. Such number of years shall be expressed as years and months. Notwithstanding the foregoing, if the employee has 15 but less than 30 years of Service at the date benefits commence under the Individual Account Trust, such lump sum shall be reduced by multiplying it by one hundred percent minus the product of (a) 8/12th of 1% and (b) the number of months, if any, by which the commencement date of benefits under the Individual Account Trust precedes the month in which the employee reaches age 62.

An employee entitled to receive only a lifetime benefit under the Individual Account Trust shall receive

a lump sum equal to the life only monthly benefit payable under the Individual Account Trust, multiplied by the number of years from the date lifetime benefits commence under the Individual Account Trust to the month when the employee will attain age 75, such period not to exceed 20 years. Such number of years shall be expressed as years and months.

An employee who is entitled to both a lifetime benefit and a temporary benefit shall be entitled to a single lump sum equal to the sum of the individual amounts calculated in accordance with the two preceding paragraphs.

Any reduction under the Individual Account Trust for Worker's Compensation, any benefits paid from any qualified retirement plan, and any severance allowance payable by the Company shall not be reflected in calculating the amount of any lump sum payment.

Reduction For Other Payments

The benefits described may be subject to the provisions of Section V of the Settlement Agreement.

The above is a summary of key provisions only.

6/30/87
11:00 P.M.

LTV STEEL COMPANY
EMPLOYEE INVESTMENT PROGRAM

Purpose

To define changes to the priority of distributions from the Profit Sharing Pool.

Effective Date

January 1, 1988 and with respect to the Profit Sharing Pool distribution for 1987.

Benefit Provisions

The Employee Investment Program in effect on January 12, 1987, except as amended by this document.

Priority of Sharing Pool Distribution

Employees who have sustained a "Shortfall" as provided in paragraph 3(f) of the Employee Investment Program shall be paid first out of each year's Profit Sharing Pool, in chronological order in which such Shortfall occurred.

A $26.82 per month contribution for health benefits required for each designated active employee covered by the Program of Insurance Benefits will be accumulated by month and the current year total of such liability (including any unrecovered liability which shall be carried forward from a prior year) shall be recovered by the Company second.

If pre-tax, pre-Plan income of the Steel Group as described in paragraph 2.a. of the Employee Investment Program exceeds $200,000,000, then ten percent (10%) of such income in excess of the $200,000,000, but only up to the amount of cash left in the Profit Sharing Pool after distributions have

been made to the first and second priorities will be applied third to recovery by the participant of the prior year's $26.82 per month contribution for health care benefits (or such lesser amount applicable for participants entitled to a pension of between $200 and $226.82 per month) required from each designated retiree and surviving spouse covered by the Program of Hospital-Medical Benefits.

The balance in each year's Profit Sharing Pool shall be distributed to the employees who worked during such year in the same proportion as their Investments during such year bear to the total investments made during the year.

Health care benefits contributions (and retiree and surviving spouse recovery) paid out of the Profit Sharing Pool shall not increase the amount available for the Stock Ownership Plan.

Approval

May be subject to approval by the bankruptcy court and appropriate government entities.

The above is a summary outline of key features only and is subject to further revision.

6/30/87

LTV STEEL-USWA PENSION PLAN

1. *Adoption of the Plan*

The Company will adopt a plan to be known as the LTV Steel-USWA Pension Plan ("Plan"). The Company will establish a separate related Trust to hold and invest Plan assets. The Plan will provide for (a) monthly contributions by the Company ("Company Contributions") to each Participant's account in the Trust and (b) optional tax-deferred monthly contributions by Participants ("Employee Contributions") to their accounts in the Trust as permitted by Section 401(k) of the Internal Revenue Code.

2. *Effective Date*

The Effective Date of the Plan will be January 13, 1987. However, the Plan provision allowing Employee Contributions will be effective January 1, 1988.

3. *Participants*

Participants in the Plan will be USWA-represented employees of LTV Steel, and other hourly paid employees designated by the Company, who are working, or not working and accruing Service.

4. *Service*

Service shall consist of service under the J&L and Republic hourly pension plans as in effect on January 12, 1987 (the "Prior Plans") which is continuous as of the Prior Plans' termination date, plus service under the Plan. Service under the Plan shall be measured in the same manner as under the Prior Plans, except that service will continue during the period when a Participant is eligible for Disability

Income Benefits ("DIB") or Extended Supplemental Unemployment Benefits ("Extended SUB").

5. *Eligibility*

A Participant will be eligible to receive Company Contributions and to elect Employee Contributions while he is accruing Service, except that a Participant is not eligible for Contributions if he is eligible for DIB as a result of a non-occupational disability, and a Participant who is eligible for Extended SUB will be eligible for Contributions for a maximum of two years from his last day worked.

6. *Company Contributions*

For a Participant who has less than 15 years of Service as of the start of the year, an amount will be contributed monthly to a Participant's account equal to 40 hours times the number of weeks in the pay periods paid in the prior month, (or the number of weeks in the pay periods which would have been paid had the Participant been working) on or after the Effective Date, times an amount per hour based on the Participant's age at the start of the year:

Age on January 1	Amount per Hour
Under 30	$ .21
30-34	.29
35-39	.38
40-44	.49
45-49	.62
50-54	.78
55-59	.96
60 and over	1.14

For a Participant who has 15 or more years of Service as of the start of the year, a calculation will be made each month for each pay period paid in the prior month by multiplying the percent shown in the following table times hours paid in such pay period, limited to the number of weeks in the pay period times 40, times the Participant's hourly "Earnings

Rate" (base earnings, incentive, shift differential, Sunday premium, overtime excluding overtime premium, EPP, vacation and holiday pay for such month, and awards paid in the month for pay for lost hours of work, divided by hours paid in the month):

Age On January 1	Percent of Earnings
Under 35	3.0%
35 to 39	4.0%
40 to 44	5.0%
45 to 49	6.0%
50 to 54	7.0%
55 to 59	8.5%
Over 59	10.0%

For such Participant, for each pay period paid in the prior month the larger of the amount based on the Percent of Earnings calculation or the amount based on the Amount per Hour calculation described with the first table will be contributed to the Participant's account.

Hours paid and Earnings Rate, for such Union officials as were eligible for an earnings adjustment under the Prior Plans, and for members of the Pension and Insurance Committees described in the Basic Agreement, shall, for the purpose of calculating the Company Contribution only, be adjusted so as to be fairly representative of their normal hours paid and Earnings Rate had they not been absent on Union business. Otherwise, the Company Contribution for these Union officials shall be calculated in the same manner as for other Participants.

For a Participant who had less than 10 years of Service as of the Effective Date, the amount determined above shall be increased by 50% of the Amount per Hour contribution for the number of months of contributions equal to the number of

months of service which the Participant had as of the Effective Date.

Notwithstanding the foregoing provisions, a Participant who is eligible for benefits under the DIB (regardless of whether benefits are actually being paid) as a result of eligibility for occupational disability benefits will have Company Contributions made on his behalf to the Plan only if he elects for any month to have Contributions made, and the election will be subject to the following limitations:

(a) DIB benefits will not be payable during any month in which such election is in effect, and (b) Contributions to the Plan will continue only to the age at which benefits under the DIB Plan would have ceased, had the Participant been receiving such benefits.

7. *Legal Restrictions on Company Contributions*

If the Company is prevented by the benefit limitation provisions of the Internal Revenue Code from making all or part of a Company Contribution to a Participant's account under the Plan, the Company shall contribute such amounts in the following plan year or in succeeding plan years to the extent such amounts, when added to Company contributions made for such year or years, do not exceed the legal limitations.

8. *Employee Contributions*

Each Participant can elect (as permitted by Section 401(k) of the Internal Revenue Code) to contribute monthly on a tax-deferred basis from one percent to 10 percent (in whole percents) of his total earnings paid in the prior month, and up to 100 percent (in whole percents) of any profit sharing payment he receives under the Employee Investment Program (EIP) to the extent that the total contribution does not exceed 10 percent of his total earnings paid in

the year. Employee Contributions will be limited in accordance with Federal law. Employee Contributions will be reduced automatically by the Company as necessary to comply with the law and the 10 percent of earnings limitation. Participants will be notified in the event of any automatic reduction. If a Participant makes Employee Contributions above the legal limitations, they will be distributed to the Participant no later than April 15 of the year following the year of contribution.

9. *Vesting and Forfeiture of Contributions*

Company Contributions and investment income are vested after five years of service; they are immediately vested in the event of death or permanent incapacity. Employee Contributions and investment income are vested immediately. Non-vested Company Contributions and investment income will be forfeited in the event of termination; the forfeited amounts will be used by the Company to reduce future Company Contributions.

10. *Deposit of Contributions and Penalty for Failure to Deposit*

Company and Employee Contributions will be deposited on the fifteenth of the month following the month for which the contributions are being made, with the exception of the first Company Contribution for the period from the Effective Date through the pay periods paid in July, which will be paid within 15 days after the date of ratification of the Settlement Agreement.

If the Company should fail to make a deposit of Company Contributions (with the exception of a failure due to an Act of God) by the twenty-fifth of the month following the month for which the Contributions are being made, or for the first Company Contribution by the twenty-fifth day after the date of

Settlement Agreement ratification, the Company will be required to pay a penalty of one percent of the total amount of Company Contributions for each seven-day period or portion thereof by which the Contributions are delayed, with a minimum penalty of five percent of the total amount of Company Contributions. The penalty will be added to the deposit and allocated to Participants' accounts in the proportion that their Company Contribution bears to the total amount of Company Contributions. Errors, including omission, in individual Participant Company Contributions shall not be considered a failure to make a deposit.

Should the Company fail to deposit a Contribution within the time limits described above, the Union may, at its election, enforce the Contribution obligation by filing a grievance or commencing a legal action.

11. *Joint Committee*

A joint Company and Union committee ("Joint Committee") consisting of three members each will be created to: select a Trustee for the Plan; determine investment policy for the Plan; select investment managers and if agreed to be appropriate an investment monitor; establish the type of annuities to be offered by the Plan; select the insurance carriers from which the annuities will be purchased based on competitive bids; and oversee administrative matters. However, the Union members of the Joint Committee will have authority and responsibility with respect to USWA-represented Participants only. The Company will pay for expenses of the Joint Committee. The Company will also make its best effort to provide fiduciary insurance for committee members. Any Joint Committee disputes will be resolved by the Co-chairmen of the Company and Union Negotiating Committees.

12. *Investment*

The investment of Company Contributions will be determined by the Joint Committee. Participants will be allowed to select between two or more funds for the investment of Employee Contributions, and may change their investment option or transfer between funds monthly. Investment income will be allocated monthly to Participant accounts, based on account balances as of the first of the month. Investment expenses such as management and brokerage fees will be charged to the funds.

13. *Beneficiary*

If a Participant is married, the beneficiary will automatically be the spouse. A participant who is not married will be given the opportunity to select a beneficiary. In the absence of a selection, the beneficiary will be the Participant's estate.

14. *Withdrawal and Distribution*

No withdrawals of Company Contributions and investment income are permitted. Withdrawals of Employee Contributions (but not investment income) are permitted if the Participant is over age 59-½, or in the event of hardship as defined by federal regulations (which includes disability). The minimum withdrawal will be the lesser of $250 or the total amount of Employee Contributions.

Distribution of a Participant's entire account balance will occur upon a break in service. The normal form of distribution will be a joint and 50% spouse annuity, unless the spouse consents otherwise. This is required by law for a married Participant. Other forms of payment will include a life annuity without cash refund; a life annuity with cash refund; and other annuities as selected by the Joint Investment Committee.

With respect to the distribution of Company Contributions and investment income, a lump sum will be paid automatically if a Participant's account value is less than $3,500. Also, a Participant may elect, with spousal consent, that Company Contributions and investment earnings up to the greater of $10,000 or 10% of the amount be paid as a lump sum. Otherwise Company Contributions and investment income will be paid in the form of an annuity. A lump sum is available at each Participant's option (with spousal consent for a married Participant) for Employee Contributions and investment income.

If the total account value is at least $3,500, the Participant may elect (with spousal consent for a married Participant) to defer distribution until a later date, but not later than age 62.

15. *Miscellaneous*

a. *Recordkeeping*

Participant recordkeeping will be performed and related expenses paid by the Company.

b. *Trust Expenses*

Trust expenses will be paid by the Company.

c. *Account Statements*

Participants will receive account statements, as frequently as agreed to by the Joint Committee but at least annually, updating the value of their accounts.

d. *Reporting to Union*

The Company will provide to the International and each Local Union monthly reports by plant locations of Company and Employee Contributions paid to the Trust.

e. *Loans*

On or before January 1, 1989, a loan provision will be added to the plan which will allow Par-

ticipant loans up to 100% of the amount of Employee Contributions and investment income, subject to legal restrictions.

16. *Disputes*

If any difference shall arise between the Company and a Participant as to such Participant's eligibility or Contribution amounts and agreement cannot be reached between the Company and a representative of the International Union, such question shall be referred to the Board of Arbitration or the Arbitrator, as appropriate, established under the Basic Agreement, provided that the President of the International Union (or his designee) has given written approval of such referral. The Board of Arbitration or the Arbitrator shall have authority only to decide the question pursuant to the provisions of the Plan, applicable to the question, but it shall not have authority in any way to alter, add to or subtract from any such provisions. The decision of the Board of Arbitration or the Arbitrator or any such question shall be binding on the Company, the Union and the Participant.

17. *Rulings and Consent to Establish Plan and Trust; Remedies if Not Obtained*

In order to establish the Plan, it will be necessary to obtain from the Internal Revenue Service a ruling that the Plan qualifies under Sections 401(a) and 401(k) of the Internal Revenue Code and a determination that Company Contributions are deductible under Section 404 of the Code. If these rulings are not obtained, then the Union and the Company will negotiate to develop a comparable plan at comparable cost to the Company which can gain approval.

18. *Plan Benefit Offsets*

The benefits described may be subject to the provisions of Section V of the 1987 Settlement Agreement.

SALARIED PENSION PROGRAM

EFFECTIVE DATE: 10/86 REPUBLIC
1/87 J&L

PROGRAM ELEMENTS:

—INDIVIDUAL ACCOUNT TRUST
—ELIGIBILITY
—RETIRED PARTICIPANTS
—VESTED ACTIVE PARTICIPANTS
—PAYMENTS TO RETIRED PARTICIPANTS

PBGC PAYMENT	% OF LOST BENEFIT
LESS THAN $400	100%
$400 TO $549	95%
$550 OR MORE	90%
CAP @ $1,600/MONTH	

—PAYMENTS TO VESTED ACTIVE PARTICIPANTS
—75% OF LOST BENEFITS IF 30 OR MORE YEARS SERVICE @ DOPT
—$1,600/MONTH CAP

—75% OF LOST BENEFITS IF AT LEAST 10 BUT LESS THAN 30 YEARS @ DOPT

—$1,600/MONTH CAP
—30 & OUT WITH MINIMUM AGE OF 57
—15 & OUT @ AGE 60
—SHUTDOWN

—55/15
—RULE OF 80
—RULE OF 25 WITH PAYMENT COMMENCING WHEN 30 YEARS OF SERVICE WOULD HAVE BEEN ATTAINED

—PRE-RETIREMENT SPOUSE COVERAGE

—50% SURVIVING SPOUSE COVERAGE TO MAX OF $800

—ELIGIBILITY @ 55/10, 30 YEARS OF SERVICE, AGE 65

—DEFINED CONTRIBUTION PLAN

—CONTINUATION OF EXISTING PLAN FOR VESTED ACTIVES BASED ON % FORMULA

—TEMPORARY ADDITIVE PROVIDED TO NON-VESTEDS TO PROVIDE FOR LOSS OF ACCRUED BENEFIT UNDER TERMINATED PLAN

SALARY VERSUS HOURLY PENSION PROPOSALS

—NO PHASE IN OF 30 & OUT FOR SALARIED

—NO LUMP SUMS

—NO EXTENDED SUB

—NO 50/20 EARLY RETIREMENT ELIGIBILITY

—SALARY CAP @ $1,600/MONTH VERSUS $1,200/MONTH FOR HOURLY

SALARIED INSURANCE PROGRAM

—HEALTH CARE

—WITH SIGNIFICANT CO-PAYS ALREADY IN PLACE, *NO $26.82 PER MONTH CONTRIBUTION*

—REDUCE ELIGIBILITY FROM *AGE 60 TO AGE 57* WITH RETIREMENT 30 YEARS SERVICE

—LIFE INSURANCE

—FOR UNDER AGE 65 RETIREES INSURED FOR MORE THAN $20,000, REDUCE COVERAGE TO A MAX OF $20,000 UNTIL AGE 65, THEN $5,000 FOR LIFE, OR PRESENT AMOUNT OF LIFE INSURANCE IF LESS THAN $5,000

—RETIREMENTS ON OR AFTER JULY 1, 1986 HAVE RETIRED LIFE INSURANCE COVERAGE OF $5,000

SALARIED MANNING

—2.6% REDUCTION BY 6/30/88 FROM 1ST QUARTER 1987 BASE OF $6,409

—ABOUT 170 REDUCTIONS

—EXISTING SEVERANCE PROGRAM TO APPLY

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 86-B-11273 BRL through 86-B-11334 BRL inclusive, 86-B-11402 BRL and 86-B-11464 BRL

IN RE: CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*, *Debtors.*

AFFIDAVIT OF KATHLEEN P. UTGOFF

I, Kathleen P. Utgoff, being duly sworn, hereby state that I am the Executive Director of the Pension Benefit Guaranty Corporation ("PBGC") and that I have held the position of Executive Director since August 1985. As Executive Director, I have personal knowledge of the adoption and application of substantive PBGC policies. The following statements in support of the PBGC's objection to the Motion for an Order Authorizing LTV to Enter into Certain Agreements and Programs and to Make Certain Payments are true to the best of my knowledge, information and belief.

1. The PBGC is a self-supporting United States Government agency that administers the pension plan termination insurance program established by Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). When a pension plan covered by the insurance program terminates without sufficient funds to pay benefits, the PBGC pays benefits under the plan subject to the limitations of Title IV of ERISA.

2. The termination insurance program set forth in Title IV of ERISA was enacted as a reaction to the tragedy that occurred when an underfunded defined benefit pension plan was terminated. The Studebaker case, in particular, was cited by Congress as an illustration of the need for a pension plan termination insurance system. Studebaker, the car manufacturer, operated for many

years. It had adopted a defined benefit pension plan, that is, a pension plan that promised the payment of specified amounts upon retirement after a required number of years of employment. In 1964, Studebaker went out of business. The pension plan that was to provide benefits to employees who had spent their working lives at Studebaker did not have enough money to pay those benefits. Because there was no pension plan termination insurance program, participants who expected to retire with regular income from the pension plan were left empty-handed or with an amount far less than the amount promised in the plan.

3. The pension plan termination insurance program was established to prevent a recurrence of the type of tragedy that occurred at Studebaker, not to provide funding for the ongoing retirement programs of operating companies. Nor was the program created to provide interim financing or bail-outs to financially troubled companies. For PBGC to undertake such tasks would be a fundamental transformation of its historic role, and would involve massive additional costs that would threaten the survival of the termination insurance program.

4. The purported termination of a plan, when combined with the establishment of new benefit arrangements designed to provide substantially the same benefits in the future as the terminated plan, is not a true plan termination that may result in the payment of PBGC guarantees. If PBGC were required to provide guaranteed benefits under such circumstances, it would be advantageous for any company whose pension plan has unfunded liabilities in excess of the termination liability imposed under Section 4062 of ERISA to "terminate" the insufficient plan and to adopt a new benefit arrangement that provides the benefits PBGC does not guarantee. This would result in payment by the PBGC, rather than by the company, of a major portion of the cost of the company's ongoing retire-

ment program. This result is completely at odds with the statute's purpose.

5. The PBGC has consistently upheld this principle. For example, in 1981, as a result of actions taken by Alloytek to terminate its defined benefit pension plan and to establish a new plan which provided substantially the same benefits, the PBGC articulated its policy regarding "follow-on plans" in PBGC Opinion Letter 81-11. A copy of the Opinion Letter is attached as Exhibit 1 and incorporated herein by reference. Also in 1981, the PBGC notified Facet Industries that it would not treat as terminated a defined benefit plan which was followed by supplemental arrangements to provide substantially the same benefits as the terminated plan. A copy of that letter is attached as Exhibit 2 and incorporated herein by reference.

6. More recently, the PBGC opposed the establishment by Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") of certain programs that would substantially replace the benefits that the PBGC does not guarantee under several terminated pension plans. A copy of the letter explaining PBGC's position is attached as Exhibit 3 and incorporated herein by reference. On June 22, 1987, the United States District Court for the Western District of Pennsylvania denied the application of Wheeling-Pittsburgh and the United Steelworkers of America ("USWA") for approval of the follow-on plans and remanded the issue to the Bankruptcy Court. The District Court found that the new benefit packages should be addressed in Wheeling-Pittsburgh's plan of reorganization.

7. PBGC has consistently worked with companies who have terminated defined benefit pension plans to establish new retirement benefit plans in compliance with Title IV of ERISA. PBGC recently reached agreement with Wolf Baking Company and members of its controlled group of corporations on establishment of a new retirement benefit plan after termination of their defined benefit pension

plan. A copy of the PBGC letter approving their arrangement is attached as Exhibit 4 and incorporated herein by reference.

8. To determine whether one or more arrangements subsequent to the termination of an insufficiently funded defined benefit plan constitute an impermissible follow-on plan, the PBGC views all arrangements together, regardless of their stated purposes, and taking into account all relevant facts and circumstances. If all the arrangements, together with the guaranteed benefits paid by the PBGC under the terminated plan, provide for the payment of, accrual of, or eligiblity for benefits that are substantially the same as those provided under the terminated plan, the arrangements violate Title IV of ERISA because they effectively continue the terminated plan.

9. The PBGC views a set or arrangements as substantially the same if it grants credit for purposes of benefit accrual, or for eligibility for certain types of benefits, for service rendered under the terminated plan or if it provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC because of the limitations set forth in Title IV of ERISA.

10. The PBGC does not view a set of arrangements as substantially the same merely because it provides a benefit based on hardship, so long as hardship is determined on a participant-by-participant basis and not on the basis of the amount of benefit reduction under the terminated plan caused by the limitations on benefits guaranteed under Title IV of ERISA.

11. After termination of a plan covered by Title IV of ERISA, the PBGC generally does not object to establishment of a traditional future service defined contribution plan for active participants with contribution to the plan based on a percentage of compensation for all participants. Such a plan provides a benefit based on a par-

ticipant's service with the employer after termination of the plan covered by Title IV of ERISA. The benefit provided under the plan is the amount available in the participant's account at retirement. Such amount is dependent upon the employer's contributions to the plan.

12. LTV and the USWA are well aware of the PBGC's position on follow-on plans. In addition to the public authorities set forth above, the PBGC has informed LTV and the USWA on numerous occasions during these proceedings that establishment of certain benefit programs after termination of a plan could, when viewed together, constitute a follow-on plan prohibited under Title IV of ERISA. When, on May 13, 1987, PBGC was orally informed for the first time of the nature of the proposed arrangement, the PBGC made clear to LTV that such an arrangement would not be acceptable under Title IV of ERISA.

/s/ Kathleen P. Utgoff
KATHLEEN P. UTGOFF

Subscribed and sworn to before me this 15 day of July 1987.

/s/ Dennis Tyner
Notary Public
DENNIS TYNER
Notary Public,
District of Columbia
My Commission Expires
January 31, 1992

[Exhibits 1-3 to the affidavit are reprinted at Pet. App. 159a-179a. Exhibit 4 is reprinted at JA 127.]

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 86-B-11273 BRL through 86-B-11334 BRL inclusive, 86-B-11402 BRL and 86-B-11464 BRL

IN RE: CHATEAUGAY CORPORATION, REOMAR, INC., THE LTV CORPORATION, *et al.*,
Debtors.

AFFIDAVIT OF C. DAVID GUSTAFSON

I, C. David Gustafson, being duly sworn, am Manager of the Actuarial Policy Division of the Pension Benefit Guaranty Corporation ("PBGC"). I make the following statements in support of the PBGC's objection to the Motion for an Order Authorizing LTV to Enter into Certain Agreements and Programs and to Make Certain Payments.

1. As Manager of the Actuarial Policy Division I have studied the funding status of defined benefit pension plans covered by the pension plan termination insurance program administered by PBGC under the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), including plans maintained by employers in the steel industry. I have participated in the preparation of proposals for reform of ERISA's minimum funding standards. In addition, I have participated in PBGC's consideration and review of proposals by LTV and the United Steelworkers of America ("USWA") to establish follow-on programs for the employees of LTV Steel Company. I also have been involved in the legal proceedings involving the USWA's request for "follow-on" relief in connection with the termination of the LTV Steel Company pension plans. Further, I have participated in PBGC's consideration and review of proposals by Wheeling-Pittsburgh Steel Corporation ("WP"), and Wheeling Pittsburgh Steel Corporation and the USWA,

respectively, to establish follow-on programs for the non-union and union employees of WP. Before assuming my present position, I was Chief of the Actuarial Operations Branch, In PBGC's Actuarial Services Division. In that capacity I reviewed the calculation of the contributions owed under ERISA's minimum funding standards to more than 500 pension plans of which PBGC is statutory trustee. The vast majority of these plans were sponsored by employers in bankruptcy proceedings.

2. PBGC has long been concerned with the nature of arrangements to provide retirement benefits established after termination of underfunded pension plans of which PBGC becomes statutory trustee. PBGC's basic concern in these cases has been to prevent the Title IV insurance program from being used to subsidize what is in fact an ongoing retirement program. Such a situation arises, for example, upon termination of an underfunded pension plan when the employer fails to pay for PBGC's guaranteed benefit liability and at the same time establishes a new "follow-on" program that provides non-guaranteed benefits accrued before termination, and provides for future benefit accruals or credited service for eligibility for subsidized early retirement benefits similar to what was provided under the terminated plan. The effect of such arrangements is that participants receive benefits as if no termination has occurred, while the employer is able to transfer much of the funding responsibility to PBGC.

3. Until its termination effective September 30, 1986, LTV Steel maintained the Republic Retirement Plan ("Republic Salaried Plan") for certain of its non-union employees. LTV Steel maintained the Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 ("Republic Hourly Plan"), the Jones & Laughlin Hourly Pension Plan ("J&L Hourly Plan") and the Jones & Laughlin Retirement Plan ("J & L Salaried Plan") until their termination effective January 13,

1987. Under the terms of the Republic Salaried Plan, the Republic Hourly Plan, the J & L Salaried Plan and the J & L Hourly Plan (collectively, the "Plans"), LTV Steel promised that retirees and their beneficiaries would receive fixed benefits calculated according to specified formulas based on a participant's age, length of service, and past earnings. LTV failed, however, to maintain adequate funding for these benefits.

4. In 1985, LTV requested that the Internal Revenue Service grant funding waivers for amounts required to be contributed to the Republic Hourly Plan, J & L Hourly Plan and J & L Salaried Plan for the 1984 plan year. The waiver request was granted, permitting LTV to amortize the contribution in excess of $170 million due for the 1984 plan year over 15 years. In 1986, LTV requested contribution waivers for amounts owed for the 1985 plan year and the amount of amortization for the 1984 plan year to the Republic Hourly Plan, the J & L Hourly Plan and the J & L Salaried Plan. That waiver request was denied.

5. After payment of monthly benefits owed in September 1986, the Republic Salaried Plan had $7700 available to pay October benefits totalling approximately $1.7 million. PBGC therefore was required under Section 4042(a) of ERISA to seek termination of the Republic Salaried Plan in order to assure that benefit payments to retirees were not interrupted. The United States District Court issued an order terminating the Republic Salaried Plan effective September 30, 1986, and appointing the PBGC statutory trustee. The PBGC has been paying benefits under the Republic Salaried Plan since October 1, 1986.

6. Of the approximately $600 to 650 million in contributions payable to the J & L Hourly Plan, the J & L Salaried Plan and the Republic Hourly Plan, from the plan year beginning January 1, 1984, and ending when

the Plans terminated, LTV has paid $20 million. In December 1986, LTV notified the PBGC that it would not make any further contributions to the Plans nor would it contribute amounts past due. Consequently, the PBGC initiated proceedings under Section 4042(a)(1) of ERISA to terminate the J & L Hourly Plan, the J & L Salaried Plan and the Republic Hourly Plan.

7. The vast majority (85 per cent) of retirees under the Plans are receiving from the PBGC 100 per cent of the benefit they were receiving before the Plans terminated. On average, retirees are receiving 91 per cent of the benefits provided under the Plans. Without PBGC's guarantee, participants would receive only about 35 per cent of their benefits under the Plans.

8. On June 25, 1987, the USWA and LTV Steel agreed to certain benefit arrangements as part of a new collective bargaining agreement. LTV has not provided all of the materials requested by the PBGC to evaluate the Follow-on Agreement. Nevertheless, based upon the information that PBGC has received, it is apparent that the follow-on programs agreed to by the USWA and LTV Steel ("Follow-on Agreements"), if implemented, would constitute *de facto* continuations of the J & L Hourly Plan and the Republic Hourly Plan. In addition, without providing specifics, LTV Steel has informed PBGC that it intends to implement similar follow-on programs for its salaried employees. Such programs would therefore constitute *de facto* continuations of the J & L Salaried Plan and the Republic Salaried Plan.

9. More specifically, the Follow-on Agreements, in conjunction with PBGC payment of guaranteed benefits, will provide participants and retirees in the J & L and Republic Hourly Plans with benefit amounts substantially similar to amounts they would have received under the J & L and Republic Hourly Plans (the "Union Plans") had they not been terminated. One component of the

Follow-On Agreements, the Individual Account Trust ("IAT"), would, by its express terms, replace a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination. The IAT would provide up to 100 per cent of the difference and no less than 90 per cent of the amount not provided by PBGC. The IAT also permits payment of special benefits provided under the Union Plans for participants who were not eligible for such benefits as of the date of plan termination. For example, 75 per cent of the special "30 and out" benefit offered under the Union Plans would be provided under the IAT for participants who become eligible for the benefit after the Union Plans terminated. The IAT also provides at least 75 per cent of shutdown and layoff benefits available under the Union Plans to those who become eligible after termination of the Union Plans. The 75 per cent benefits are augmented by the program described below so that, in some cases, more than 100 per cent of lost benefits are provided.

10. Another component of the Follow-on Agreement, the Disability Income Benefits for Active Employees ("DIB"), allows participants in the Union Plans who become disabled after the plan terminations to receive a benefit under similar conditions and in an amount substantialliy similar to the amount that would have been provided before termination of the Union Plans.

11. The Pre-Retirement Surviving Spouse Benefit, Extended Supplemental Unemployment Benefits and Lump Sum Severance Program components of the Follow-on Agreement all operate to replace benefits that were available under the Union Plans that have either been reduced or are not paid by the PBGC as a result of plan termination.

12. Permitting the Follow-on Agreement and any similar agreement for participants covered under the Union Plans would pose a clear threat to the financial integrity

of the Title IV guarantee program. Employers and unions have a natural incentive to take advantage of the availability of PBGC funding in order to provide the highest possible amount of pension benefits at the lowest possible cost to employers. Because of this incentive, a variety of manipulations of the termination process have been attempted in order to shift to the PBGC most of the cost of ongoing retirement programs. The PBGC has successfully opposed such attempts in the past. Approval of the Follow-on Agreement would create a precedent that may well be used with respect to the pension plans that already pose the greatest and most immediate threat to the PBGC's viability.

13. The Administration recently proposed various amendments to ERISA, including an amendment that would clarify that, "[e]xcept to the extent permitted by the PBGC, an employer (and its controlled group) would be precluded from establishing retirement programs which, in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits." (The Administration's Proposal on the Funding and Termination of Defined Benefit Pension Plans at 18.) This proposal would merely clarify, not change, existing law. On a number of occasions over the past several months, I have been asked to explain this proposal to Congressional staff members and others, and have stated consistently that the proposal is intended only to clarify existing law.

14. As a result of several recent pension plan terminations, including the termination of the Plans, PBGC is paying more in benefits than it is receiving in premiums for the first time in its history. Notwithstanding last year's premium increase from $2.60 to $8.50 per participant, annual benefit payments to participants in the Plans alone are projected to exceed the PBGC's annual premium income from single-employer plans and to exceed

the total amount that the PBGC is currently paying participants in all of the other plans of which it has become trustee since 1974. This cash drain is especially alarming in light of the PBGC's current deficit. As a result of termination of the Plans, the PBGC's deficit increased by more than $2 billion. PBGC currently has about $3 billion in assets, 7 billion in liabilities, and thus a deficit of approximately $4 billion. This deficit would be increased by billions more should the remaining major integrated steel producers terminate their pension plans. Establishment of the Follow-on Agreement here would greatly increase their incentive to do so. Accordingly, it is essential that strategems for shifting pension liabilities to the PBGC, such as that employed here, be prohibited.

/s/ C. David Gustafson
C. DAVID GUSTAFSON

Subscribed and sworn to before me this — day of July 1987.

/s/ [No signature]
Notary Public

My Commission expires:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 86 B 11270/334, 404 & 464

IN THE MATTER OF CHATEAUGAY, *et al.*,
Debtors.

July 16, 1987
United States Courthouse
Foley Square, New York

Hearing on application by LTV to enter into collective bargaining agreement w/USWA.

BEFORE:

HON. BURTON R. LIFLAND,
Bankruptcy Judge

[Appearances of counsel omitted in printing]

[8] PROCEEDINGS

MR. KADEN [counsel for LTV]: Your Honor, with the Court's permission, I would propose to make a brief opening statement.

Mr. Weisz [counsel for PBGC] and the Debtors and the union have agreed to proceed without direct testimony by affidavit.

Although we have provided in our agreement, subject to the Court's wish, that if counsel wishes to ask the witness for a brief minute or two summary of his affidavit that that would be acceptable to us.

We don't intend to do that ourselves. We are prepared to proceed on the basis of the affidavits which was submitted to the Court this morning and to make those two witnesses available for cross-examination.

THE COURT: Mr. Kaden, I have just received the last set of those affidavits only a few minutes ago and I started to go through them.

I think it might be appropriate to follow the alternate suggestion that you or Mr. Weisz or Mr. [9] Moloney can summarize the contents of the affidavits, the agreed upon submissions for a prima facie case.

MR. KADEN: Yes. Do you mean counsel should summarize or that the witness should be asked to summarize or either?

THE COURT: I believe you had indicated you had some plan of exposing those affidavits either through counsel, which is satisfactory to me, if that—

MR. KADEN: Fine, we will do that with respect to Mr. Tremain's affidavit through the opening statement.

The affidavit itself includes a number of charts attached with it summarizing the agreement. I think we can do that speedily in the opening statement and then Mr. Tremain will be available for cross-examination.

I think on the basis of that affidavit we think the application ought to be approved. This matter, as you know, Your Honor, involves an application for approval under Section 105 of the collective bargaining agreement, including certain prepetition expenses.

And as well as separate applications seek [10] approval of certain benefits for salaried employees and for the payment of certain prepetition expenses for employees pursuant to the profit sharing employee investment program that was part of the 1986 collective bargaining agreement.

The heart of the matter, as this Court appreciates, is the approval of those parts of the 1987 collective bargaining agreement between LTV Steel and the United States Steelworkers Union.

That, in our view, requires Court approval because they do involve the payment of certain prepetition obligations.

The negotiation leading to this agreement has been an arduous one and has occupied the Debtors and the union since last fall.

Shortly after the filing of this proceeding in July of 1986, the Debtors initiated a request for negotiations to modify the then existing collective bargaining agreement with the steelworkers.

It was the Debtors' belief at that time that although the concessions obtained in the 1986 negotiation, concluded in March of that year, had been substantial, indeed more substantial in amount, [11] in consequence than those achieved by any other major steel producer.

Those concessions had not been adequate to avoid the bankruptcy filing.

And promptly after the bankruptcy filing, in September of 1986, the Debtors sought additional negotiations.

In the normal practice of industrial relations and collective bargaining, it is not an easy matter to go back to a union who has just given and ratified concessions in the dimension involved in the 1986 agreement and ask for still more.

But it was LTV's view that additional savings were necessary, savings in the area of health insurance costs and authorization at that time to terminate the pension plans.

It was simply not possible for this company to go forward and reorganize in circumstances where an ever declining base of active employees, now about 20,000 or less, had to support an ever growing base of retirees.

That phenomenon comes about in an industry that is shrinking as a result of all the competitive forces that affect the steel industry.

[12] But to support more than 42,000 retirees on a shrinking base of active workers in a highly competitive industry was simply not feasible.

And the level of pension and insurance costs were driving this company further and further into the ground.

Because this company was built from the consolidation of at least three steel companies, historical circumstances

gave it a bigger problem in terms of that ratio of active to retirees more than its major competitors, most of its major competitors. And that imbalance was a driving force behind the bankruptcy filing, was one of the factors that made this company uncompetitive in the marketplace and required the filing of the bankruptcy petition.

LTV, as I said, immediately sought negotiations and started those discussions in September of 1986.

The steelworkers' position, not surprisingly, was, "We just concluded an agreement, we have given you $3.44," that's Mr. Tremain's affidavit and the charts are attached in Exhibit B, "we have brought the cost down by that amount. We have made you as competitive as we can. Indeed, we [13] have agreed to other concessions with the other major steel producers. And we are not particularly interested in additional concessions so soon after that negotiation."

The company persisted and periodic discussions were held. But until the PBGC acted itself under the involuntary proceedings of ERISA to terminate these pension plans, the steelworkers had relatively little interest in productive negotiations.

LTV sought from the steelworkers, during those fall negotiations, their consent to a voluntary termination. It used to be that ERISA permitted a voluntary termination notwithstanding a barrier in a collective bargaining agreement.

Indeed, in one well known case involving Allis-Chalmers, a company known to this Court, Allis-Chalmers tried to get the union's consent to termination, failed and terminated itself and with the support of the PBGC fought off a Court attempt by the union to stop that voluntary termination.

Congress responded to that and other events by changing the law so that a collective bargaining provision that said you cannot terminate [14] this pension plan was a bar to a voluntary termination, but not to an involuntary termination under Section 4042.

And so we sought, during the fall, to get the union's consent to a voluntary termination. They would not give it.

And in January, as you know, PBGC moved before Judge Owen under the involuntary section of ERISA to terminate these plans.

They asked LTV to consent. And LTV said, "We have no objection. We consent to that."

Indeed, it was our objective, but we couldn't proceed under the voluntary termination provisions because of the barrier in the collective bargaining agreement.

Immediately following that termination action of the PBGC approved by Judge Owen, the negotiations became more serious. Because, as you well appreciate, 8,000 retirees lost their supplemental retirement benefits, in some cases amounting to more than fifty percent of their income.

Many of those 8,000 retirees getting $400 supplements in addition to a basic pension benefit that might have been $300 or $250 or $400 or $450, [15] the loss of that $400 was a dramatic change in their earnings.

You know that because this Court heard from retirees, Congress heard from retirees, certainly the union and company heard from retirees and the steelworkers came back to the negotiating table and said, "We want to negotiate to deal with the hardship caused to those retirees and the hardship caused the active employees because the termination of the pension doesn't work only consequences on those retirees, it also works serious consequences and hardships on the active employees."

An active employee who died after pension termination leaving his widow, his widow used to, under these pension plans, get certain espousal benefits eliminated by the termination.

If an employee became disabled after January 13, 1987, those pension plans used to provide fairly good disability payments. Eliminated as a result of the termination.

And so in each of those cases an employee with twenty-nine and a half years of service on January 1987 was probably counting the days until he hit thirty years and could get that early retirement [16] under the thirty and out benefit. Eliminated as a result of the termination.

So it's not just the 8,000 employees, the problems and the pressures were there throughout the work force as a result of the PBGC's action terminating the plans and that gave impetus to the negotiations.

The steelworkers came in and said, "We got to deal with the problems of all these different groups of employees affected by termination." They wanted to negotiate, follow on or replacement or whatever name you want to give it, plans, benefits to deal with those hardship circumstances.

The company said, "Okay, we are ready to negotiate about that, but we know that will cost. We are in Chapter 11 and we cannot afford the cost of those replacements unless we get some savings.

"We may not be able to offset dollar for dollar the cost of those benefits that we have to give you either because that's the way the negotiation will go or because it's fair and just and sensible to do so for our work force, but we have to find a way through getting savings and in other areas to offset some of that cost."

[17] And that is the essence of this bargain.

The agreement ultimately negotiated after all the difficulty that this Court is well aware of through winter and spring and early summer of 1987.

The 1987 agreement set forth in simple, easy to understand charts attached in Exhibit B to Mr. Tremain's affidavit.

Those charts come from the slides we used to present this agreement to the Unsecured Creditors Committee, to the Bank Committee, to the Equity Committee, to the Board of Directors of LTV and they include full and

complete summaries of the formal settlement agreements and term sheets.

That's the essence of the agreement.

In the first year, 19—the first year cash flow, $70.8 million of costs attached to these different benefit areas where problems were created as a result of the termination.

Now, you will hear talk from the PBGC that what we have done is recreate the same old program. Far from it. We had to take that program apart, set it aside because it wasn't there anymore and try to address in these very complex negotiations one by one the kinds of problems I mentioned:

[18] The problems of espousal benefits, the problems of people getting disabled, the thirty and out problem, the problem of what happens when facilities shut down and the problem of those supplemental payments to current retirees.

And in each case, the solution was not some pension plan thrown back into the insurance system under Title 4 of ERISA that PBGC could guarantee and insure once again. Far from it.

In each case, it was a specially crafted program; sometimes an insurance program, sometimes a retirement plan, sometimes a nonqualified retirement plan and sometimes a qualified retirement plan.

Each of them designed to respond to the exigencies of that problem within the law.

Now, that's the $70.8 million of cost over the course of ten years. As the last page of Exhibit B in Mr. Tremain's affidavit makes clear, it is a ten-year cash flow. You have to make one important assumption in developing that cash flow, as LTV did, as Mr. Tremain's materials indicate.

You had to make sume assumption about the shutdown of what are called supplemental facilities, the questionable facilities in terms of their future [19] life.

And whenever you did shut down a facility, then two years later you would begin to have some costs, in some cases some costs a year later under this new agreement.

So we made the most conservative assumption possible that all those facilities on the list should shut down on January 1, 1988.

In fact, it's an impossible assumption. We are going to come soon to this Court for an approval—excuse me, I am not sure when it comes to this Court, we put in the capital review process a decision by the company to realign the blast furnace at Warren which accounts for more than half of the supplemental facility employees.

We are doing that because Warren is operating profitably and productively right now. As a result, there is not going to be any shutdown on January 1, 1988. It's an impossibility.

That's all by way of saying that the charts in there about the cash flow is the most conservative possible and it shows you start at $70.8 million, you have a blip up in the third year as a result of those assumed shutdowns to $79 million, [20] then it trails off down to $53 million in the tenth year.

The reason it goes down is that the current retirees who are getting some portion of their cut-off supplements, they are a finite population, we know exactly who they are today, they are the people who got $750 one time hardship payment by Order of this Court and as they—as their eligibility in those supplements expire because they hit a certain age, move into Social Security, whatever, or as they die, as some of them will, that obligation goes down.

And that accounts for the decline in the cash flow from the $70.8 million to the $53 million.

Now, the $70.8 million consists of six or several separate pieces, totally different programs, and the important point to make about those programs is that not one of them is a qualified defined benefit plan that will be insured and guaranteed by the PBGC.

One of them, for people going forward, is a defined contribution plan, fixed obligations to contribute based on the number of hours worked and the rates of pay in which the employee takes the [21] investment risk.

Another is insured annuities for espousal benefits, when an active employee dies on the job you get a certain amount in effect of an annuity although over time it disappears because it's offset by the defined contribution account.

Another of them is a disability program so that these people who get totally disabled won't be out of benefits.

But it has very different features of eligibility, of qualification, of maximum benefits than the old plan and it's not done through a qualified and insured pension plan.

It's done through a 501(c)(9) trust in which there is a much greater risk of whether that funding promise is secure and will be kept, whether the employee can fully count on it if things go poorly for the company.

The thirty and out benefit has a new age requirement of fifty-seven—

THE COURT: What are you saying is that these plans will in no way ever be PBGC offers?

MR. KADEN: Never.

In case three, involve additional risks we [22] we can spell out, I won't take the full time to do that. Additional risks to the employees:

Risks of investment, risks of eligibility, risks of qualification that make them significantly different and they were the product of this arduous negotiation. That's the $70.8 million on the cost side.

What do we get on the savings side? We sought and obtained $20 million of savings in health insurance.

I think Your Honor knows how difficult that is to achieve in a collective bargaining setting where people, active employees and retirees have been getting their basic insurance paid for, health insurance paid for fully by the company without any contribution for a long time.

And this agreement institutes for the first time a contribution of $26.82 a month for every participant, active employee and retired person.

There are different ways it's collected, there are different ways depending on considerable profits. In some cases it might be reimbursed, but the company is assured under this contract that $20 million of savings. And that is a major achievement [23] in this industry.

Where did we get $26.82? The $20 million was the bargain. If you take the full number of participants active and retirees and divide it into $20 million you come up with $26.82 a month. That is the way the collective bargaining process tends to work.

That's—secondly, we got for the first time in this industry in any major steel producer a management agreement that commits on a companywide basis the reduction of a significant number of jobs through more productive utilization of the work force.

And it doesn't just set forth a process leading to people leaving the work force so we can have fewer workers and be more productive. It commits by contract the number of 517 jobs.

When we showed that to the Bank Committee, one of the bank officers who has been involved in this industry for a long time and has studied many management agreements, he said, "This is the first time I seen a contractual commitment to reduce the number of jobs by that number."

517 jobs, $40,000 a job, is a $21 million [24] savings when it's fully implemented.

There is an inducement payment that eliminates some of the savings the first year, it takes time to go through the process in the first year, but when it's fully implemented, it's a real $21 million in savings.

Finally, we got agreement from the union to consolidate certain crafts so in some instances a pipefitter can also do welding or a plumber can also do something else. That's all set forth in the agreement.

It will lead ultimately to the fact that the company will not have to replace 220 positions when they are eliminated by attrition because of this right to combine crafts. It's another $9 million of savings when fully implemented.

So the $50 million of savings offsets substantially when this agreement is fully in place the $70 million of costs. That's all we put in terms of hard dollar savings.

But as Mr. Tremain's affidavit and the charts make clear, there are additional advantages that will make this company more productive in the long run.

[25] We set up for the first time a joint policy review committee in which the senior managers of the steel company and the senior leaders of the United Steelworkers, including their international president, will meet every quarter, they will exclude from their agenda matters affecting the bankruptcy or affecting collective bargaining and labor relations.

But this will give them a forum to develop a working partnership, a cooperative relationship on how to make this company work better in the future.

We think that will be something that we can look back to three or four years from now, well after the end of the reorganization, and say that we would make this a better company.

Similarly, we have a process for eliminating unproductive work practice, also utilization of equipment on a local basis plant by plant.

That too will lead to savings in the future, but we haven't quantified them or used them in this calculation.

We agreed to the management experiment concerning the LTV Sumatoma plant in Cleveland.

When you add all this up we believe it's a [26] good agreement, but its terms provides that it will last for the duration of the reorganization.

It will be subject to negotiation at the end of the reorganization period, it must be concluded in the new agreement before plan confirmation. That's the end point.

And therefore, what we have done, is put in place a framework for labor stability on an effective basis for the period of the reorganization.

Those advantages of stability, of fair treatment to the retirees, of a decent agreement to go forward through this difficult Chapter 11 process over the coming months is, we think, of enormous consequence and importance; and in terms of this Court's approval, what it requires is the authorization to make these prepetition payments, for example, total retired people who will get part of their lost supplement required an average of ninety-two and a quarter percent of those $400 sums that they lost.

We think, taken as a whole, it is plainly in the interest of the estate, plainly will advance the prospects for an effective reorganization.

Let me spend just a few minutes on the [27] heart of the legal objection that has been raised.

Raised yesterday before Judge Keenan in an effort to stop this hearing from going forward and will be raised today, has been in papers that we were given five or ten minutes ago before you.

The PBGC, an agency of the United States, comes before you and says, "All these arrangements that you have negotiated in this collective bargaining, LTV Steel and the United Steel Workers, violate the general purpose of ERISA."

Now at the behest of Senator Metzenbaum and Secretary of Labor Brock, who is the Chairman of the PBGC, some of us engaged in discussions with the PBGC last Friday all day for ten or eleven hours and most of Monday.

We asked repeatedly, "What is the basis for this objection? What pieces of this agreement are offensive? What is your reason? What do they say both then and in these papers?"

The overall purpose of pension plan termination under ERISA is violated by the negotiation and collective bargaining of these follow on arrangements.

When I was a law teacher, before going [28] back to practice, I used to tell my students you ought to be aware of the lawyer who tells you that the general policy of a statute requires that you do so and so or bars you from doing such and such.

Your question to them ought to be, "What provision? Where does it say in the statute? If you tell me that Congress said you can do this or you can't do that, where in the statute does it say that?"

And I submit to you, that they can't do that here with good reason. Because it's not there.

If you look at the scheme of ERISA, what you will find is the development by Congress of an insurance and guarantee mechanism where all employers pay premiums; the PBGC has the statutory responsibility in certain circumstances, either involuntarily on its own, as they did here to terminate pension plans under certain circumstances, or to receive termination notices through the voluntary provisions. That didn't happen here.

And when plans are terminated what the statute says is the PBGC appoints itself as the Trustee of those plans, it takes over the assets, it takes over the liabilities, the statute limits its [29] payments to certain guaranteed level and it's their interpretation of that provision that leads to our problem, because the guarantee level doesn't cover the benefits, some of the benefits that we are dealing with in this agreement.

The statute further says that PBGC, when you have done this—in fact, Congress stiffened the test for termination, as I indicated a year or so ago, in new legislation. They wanted to make it more difficult voluntarily to terminate.

So PBGC thought this is a distress test. It's not an issue here. It's not voluntary termination. It's no question LTV is distressed by virtue of the Chapter 11.

But the point of the matter is the statute sets forth the scheme when they can terminate, when they must terminate, what they must do after they terminate, when

they become the Trustee of the plans, how they distribute the assets they find in the plans they take over, how they pay the liabilities and what claims they have against the old sponsor.

Those claims, as you well know, in their view, amount to billions of dollars, one of the largest claims, perhaps the largest in this case, [30] maybe one of the largest ever in a Bankruptcy Court.

During the process of reorganization—

THE COURT: Don't forget the claim of Pennzoil.

MR. KADEN: Mr. Crames doesn't let me forget the claim.

During the process of reorganization that will all be sorted out. The statute sets forth those schemes. It doesn't say anything about who shalt not engage in collective bargaining. The statute doesn't say anything about who shalt not have a follow on benefit plan.

Surely the statute doesn't say anything about LTV shall not give any benefits to the spouses of active employees who die or to the families of active employees who get totally disabled on the job and for good reason.

Can you imagine the Congress of the United States passing a statute that said you can't give espousal benefits and you can't give disability benefits? It didn't happen and it would never happen.

The fact is that this statutory scheme in ERISA lives, coexists with an obligation under 1113 [31] to bargain collectively, including to bargain collectively over precisely these issues as the Second Circuit told us in Century Brass, and an obligation under the Taft-Hartley Act to engage in collective bargaining on a continuing basis. And there is simply no basis in that statute for this set of theories.

If there was one thing that the PBGC spun out when we sat across the table from them in Washington last Friday or writes into their papers here, they will tell you that Judge Simmons in the Wheeling-Pittsburgh case has crafted a path that you must follow.

Let me just take a moment to tell you something about Wheeling-Pittsburgh. First of all, Wheeling-Pittsburgh was a voluntary termination under the older law.

They fought over whether to accept that termination. The PBGC in Wheeling-Pittsburgh fought in Court about that and they settled their litigation in effect in a settlement agreement.

And the settlement agreement said that if you, Wheeling-Pittsburgh, negotiate any continuing pension arrangements with the United Steelworkers you [32] have got to submit them to us for review. And if we object to them, then you have got to take them to a Court of appropriate jurisdiction.

That was all set forth in the settlement agreement. That's how Judge Simmons got that case.

In December they submitted these plans to Wheeling-Pittsburgh and the union submitted these plans, not PBGC; PBGC said, "No, we don't like them in" January. Wheeling-Pittsburgh and the union said, "Why? Tell us why."

They said, "No, we don't have to design plans for you, that's not our business."

And so the company and the union went to Judge Simmons to seek approval.

Totally different setting. They had contracted to give that Judge jurisdiction. We haven't given them any judisdiction except as a creditor has a right to come in here and tell you it's not in the interest of the estate. They are not a regulatory agency.

They are a guarantee and insurance corporation charged with administering Title 4 of ERISA. That's their function.

They don't sit there to design our [33] collective bargaining arrangements for us. They don't sit there to design the way we respond to the hardship needs of these employees or active employees. There is no basis in their statute to do that.

Ultimately if we are successful here and they don't accept that, as they told Judge Keenan they would never accept it yesterday, "We will have to fight that out in other Courts." But the fact is you can't find anything in that statute to substantiate their theory.

They spin out policies. They told us last Friday these are our policies, and indeed they are, some of them are in Ms. Utgoff's affidavit submitted here.

If there is one thing we have learned recently in part by watching television is that the executive branch of our government has to follow the law, has to act within the law, does not make the law up themselves.

And in this case, the law that they are charged with enforcing sets forth the scheme of termination, insurance, guarantee and claims. It didn't say anything about changing the scope of free [34] collective bargaining.

We have set forth all those—some of those arguments in our materials and we will be certain to elaborate on them if the occasion presents itself, but the bottom line is, we think this agreement is in the best interests of the estate.

We think these prepetition payments ought to be authorized because they are integral to the whole agreement. And the whole agreement is integral to the continuing productivity of the steel company.

And, in turn, that continuing activity is crucial to the capacity of this Debtor to reorganize effectively.

We have also these other applications, comparable program for salaried employees with respect to the salaried retirees requires authorization of the Court to make those prepetition payments in the same fashion; and in addition, although it was not part of the '87 negotiations, the '86 agreement included this stock ownership plan and profit-sharing plan, some of the stock that would have to be contributed to that trust for employees was earned during the period April 1 to July 17 prepetition, and therefore our view has been that the [35] contribution

of that preferred stock requires Court approval and that application is in this package as well.

We believe, when you hear all the testimony from our witnesses, from our adversary's witnesses, we submit we will conclude that these agreements will advance the best interests of the estate and advance the cause of effective reorganization and should be approved. Thank you.

MR. SELTZER [counsel for USWA]: Your Honor, one cannot over-estimate the importance of this agreement to the company, to its creditors and to the people I represent here today, the union represented here today by its International President Lynn Williams, vital to the thousands of retirees who have given their working lives in the mills of this company and its predecessors and vital to the active employees who work today for this company.

It alleviates much of the hardship that was brought upon active and retirees by the termination of pension plans in January of this year.

It alleviates the suffering of the type of people like Eldo Tollis and Richard Walter, who testified before you several weeks ago in the

* * * *

[Testimony of Arthur Cole Tremain, witness for LTV. Cross-examination by PBGC counsel.]

[104] Q. When you say—if I remember your testimony and your affidavit, forgetting the savings now, let's just talk on the cost side, it cost $71 million in the first year?

A. That's first year cash flows.

Q. What about second year, third year, fourth year?

A. Oh, it's in the affidavit.

Q. Tell us how much it is.

A. I want to be accurate. Let's see if I can find it again.

Okay. The forecast of cash flow in the second year

$70,300,000, and the third year $79,100,000. That number is in my mind considerably overstated.

Q. Why did you put it in your affidavit?

A. These are cash flows that we used in [105] bargaining, and in bargaining the union asked us to include in our forecasted cash flows the cost of shutting down the supplementary units, and for the purpose of meeting that request we assumed in all of our work that all of the supplementary units were closed on January 1, 1988.

Q. They will not be?

A. In fact, there will be no significant supplementary unit closed on January 1, 1988.

Q. Is it fair to say the cost will continue from $71 million on up through the year?

A. I am sorry?

Q. Is it fair to say that the cost will be on an increasing basis?

A. No, they will decrease.

Q. When will they start decreasing?

A. If we don't have those shutdowns, they will be decreasing right off the bat.

Q. Have you seen the business plan of the company?

A. I have seen business plans of the company.

Q. They project no shutdowns?

A. They project no shutdowns right now of the supplementary units other than the 14 inch bar mill [106] in Aliquippa.

Q. Do they predict any shutdown of any mills over the next five years?

MR. KADEN: Objection. This is hardly the occasion to preview the company's drafts of business plans.

MR. WEISZ: The numbers are dependent upon whether or not there are shutdowns.

THE WITNESS: I can give my personal view.

THE COURT: I will allow it.

A. My personal view is that there will be no shutdowns of major supplementary units in the next several years. I really have no ability to see farther than that.

Q. How many years?

A. Next several years.

Q. In the next several years, there will be no shutdowns other than the 14 inch mill in Aliquippa, Pennsylvania?

A. That's my personal view.

* * * *

[Testimony of James Francis Powers, witness for LTV. Cross-examination by PBGC counsel.]

[124] Q. Do you recall any proposals put forth by the PBGC at those meetings which would alleviate any substantial portion of the retirees' problems at all?

A. No, sir.

Q. You don't?

A. I do not.

Q. So it's your testimony that no—were any proposals made at those meetings?

A. Oh, yes, sir.

Q. Did those proposals address the question of the retirees?

A. They certainly did.

Q. Did those proposals detail the way to put some of the money back into the retirees' pockets that they lost?

A. Absolutely. In every one of the proposals were made by the company and by the United Steel Workers, we proposed to the Pension Benefit Guaranty Corporation that we go forward with the agreement which was explained to the PBGC in May and which was, I believe, term sheets or information provided a week [125] ago Monday and we explained why it was important to the retirees, to the company, to the employees to go forward and to get this matter behind us.

We repeatedly asked, implored, begged for them to explain in some detail what they found objectionable to the proposals that we had put before them. And we were repeatedly—we repeatedly got the answer, "The overall agreement does not fit in the overall principles of the Pension Benefit Guaranty Corporation."

Q. Do you recall any discussion of a trust under Section 4049 of ERISA being set up?

A. Yes, sir.

Q. Do you recall that the PBGC suggested prefunding that 4049 trust so as to put money in the pocket of the retirees?

A. The PBGC have never suggested anything at that meeting. What they did say was have you considered this and have you considered that?

I do not believe there was a single proposal that came across the table from the Pension Benefit Guaranty Corporation to the company or to the union.

As I said to you, we were desperately [126] trying to find out what was wrong with the proposal that we put on the table.

We had considerable discussions of a 4049 trust and were reminded by the PBGC and its counsel, Mr. Ford, who is here, that we were having discussions that dealt with the entire agreement and that Mr. Ford made it very clear to us on a number of occasions during those discussions that anything that the PBGC indicated a willingness to do was against the backdrop of an overall agreement and the subject of 4049 trust in an attempt to find out what the PBGC objected to I asked them if we could pay—if you took a typical retiree who was getting a benefit of $400 a month under the old plan, could we pay $300 of that, seventy-five percent, through a 4049 trust without the Pension Benefit Guaranty Corporation objecting.

After much discussion, they said they thought that could work provided that they could be in agreement on the entire proposal before them.

* * * *

[Testimony of James P. Jenkins, witness for PBGC. Direct examination by PBGC counsel.]

[151] So I commented that I thought the risk of a strike —that I was being told the risk of a strike was great.

In my view, the costs of a strike were unbelievably high. I made the statement that it was almost a bet the company type proposition whether or not the company should take on a strike.

• • • •

[Testimony of James P. Jenkins, witness for PBGC. Cross-examination by LTV counsel.]

[156] Q. Did you express the view to the Committee that had the company delegated the collective bargaining responsibility to you, you could have done better and be less disappointed?

A. No. As a matter of fact, I think I said to the Committee that I was disappointed in the entire industry and I have no sense whatsoever that I could have done anything better or frankly that anybody could do anything better. It seems—

• • • •

[Bench ruling by the bankruptcy court.]

[219] THE COURT: Thank you all for being patient this late in the evening.

Before I even start, I would like to point out that perhaps in the zeal of litigation the [220] parties to these applications have raised far more with respect to these applications than perhaps they really are.

The claim that this is the single most important event in LTV may possibly be so; I doubt it.

I think confirmation will undoubtedly be the single most important event in LTV. I think the nature of the business plan and the events of the next series of months will produce or should produce matters and concerns that

are of crucial and perhaps dwarf issues that are here today, then again perhaps not.

There are further assertions that the almost innocuous applications that are before me presage or deal with some wrenching policy questions involving the government and the entire pension system.

While this may have some impact or play some part, again it may not necessarily be all that keen an issue.

Some of those assessments, I dare say, are so professed, some of them are driven, perhaps by media reporting, which again can be self-serving, and [221] as I have indicated previously today, if not in this evening's hearings, this case is not being driven by concerns of what appears in the media. The case is going to be driven by the merits of the matters that are brought before me.

So what really is before me today, what I am being asked to approve are the essentials, or to put it another way, the material terms of an interim collective bargaining agreement and related agreements which, among many things, call for the payment of certain prepetition obligations to employees and retirees.

I conclude that the implementation of these agreements will help to resolve some of the most troubling issues raised to date in this bankruptcy case and will help to insure labor peace during the course of this reorganization, and will help to alleviate the extreme hardship suffered by the Debtors' retirees and employees, as has been shown to exist in the cumulative record of these proceedings.

As in all cases, the threshold issue is this Court's jurisdiction to determine these matters. 28 U.S.C. 157(a) combined with the standing order of [222] reference, grant to this Court the jurisdiction conferred upon the District Court by 28 U.S.C. 1334(a).

Pursuant to 28 U.S.C. 157(b), the Bankruptcy Court may hear and determine Core Matters which include matters concerning the administration of the estate.

While some of those objecting to these motions have attempted to obfuscate the nature of the relief requested herein by raising issues outside of and apart from those ripe for determination today, it has become abundantly clear that the relief requested forms the very essence of core proceedings under 157(b)(2) and those matters within the contemplation of Section 105.

This Court finds that the instant agreements, in some respects, encompass an ordinary course transaction, and if we were to look through Section 363(c)(1), the Debtors would not necessarily require the imprimatur of this Court to complete the entry into major essentials of the labor transactions.

However, inasmuch as these agreements also provide for the satisfaction of certain prepetition [223] obligations in contravention of the general provisions governing Title 11, the approval of this Court is mandated.

Section 105, however, provides the authority for this Court to consider approval of such payments. Pursuant to that section, this Court may authorize such payments where "necessary or appropriate."

Based upon the complete record before me today, including all filed papers, it has become abundantly clear that this Court may and should utilize its equitable power to authorize the terms and payments contemplated by the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor.

As an aside, this Court notes that Section 1113 of the Code specifically contemplates that the Debtors might unilaterally amend an existing collective bargaining agreement upon such notice as is necessary in accordance with the Debtors' needs. See Section 1113(e). I am not faced with that. But with respect to even the contemplation by Congress that that could happen, it is something that we ought consider.

[224] Therefore, were it not for the consensual nature of this agreement, the collective bargaining matters could

potentially be before me pursuant to the explicit terms of the statute.

Accordingly the Court concludes that it is beyond peradventure that it has the jurisdiction to hear the motions currently before it under the penumbra of a range of statutory authority.

Finally, the PBGC is concerned that the determination of the motion requires interpretation of novel issues of law under ERISA statutes and the application of the policies espoused by that agency.

Mere speculation as to the applicability of ERISA to the collective bargaining and related agreements are not supportive of valid objections as they are today considered under Title 11.

Indeed, as the PBGC has pointed out heretofore, it may have legal options or avenues that it can assert administratively to or in Court to implement its policy goals. Nothing done here tonight precludes the PBGC from pursuing these options or indeed from seeking legislative relief, or as they may have done in the past or apparently have done in the past by treating instances of relief to [225] employees past or present on an ad hoc case by case basis. They might well consider to do that here.

It is also interesting to note that while the PBGC argues that these agreements constitute a de facto plan of reorganization, in some sense these agreements by their very terms are scheduled to endure only as long as the term of this reorganization and are only meant, and this Court regards them, as an interim measure.

Accordingly the concern that this constitutes a plan sub rosa is unfounded.

I have considered the objections on this record and find that the relief requested is appropriate under all of the cumulative circumstances.

Therefore, the Debtors' applications are granted and they are directed to submit the appropriate Orders.

* * * *

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Jul. 23, 1987

Raymond A. Hay
Chairman of the Board and
Chief Executive Officer
The LTV Corporation
2001 Ross Avenue
Dallas, Texas 75265-5003

Re: Benefit Arrangements for Participants and Retirees in the Terminated LTV Steel Company Pension Plans

Dear Mr. Hay:

This letter reiterates the proposal of the Pension Benefit Guaranty Corporation ("PBGC") to address the needs of retirees and participants in the four terminated LTV Steel Company Pension Plans ("Plans"). The PBGC remains ready to implement this proposal, made during meetings with representatives of The LTV Corporation, LTV Steel Company and the United Steelworkers of America on July 10 and 13, 1987.

PBGC offered to appoint immediately a trustee under Section 4049 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), who would have the authority to collect amounts owed the Section 4049 Trust under Section 4062(c) of ERISA. These amounts, up to 75 per cent of "outstanding benefit commitments" under the Plans (*i.e.*, 75 per cent of the gap between guaranteed benefits and full benefit commitments), would be paid to participants in addition to the benefits paid by the PBGC. As you know, the total amount of the Section 4049 Trust's claim is approximately $150 million.

Because The LTV Corporation, LTV Steel Company and certain other entities liable to Section 4049 Trust are in Chapter 11, payments to the Section 4049 Trust would otherwise be included in a plan of reorganization to be proposed at some future date and would not provide all of the amounts claimed by the Section 4049 Trust. To eliminate this delay and to provide immediate payment to retirees under the Trust, the PBGC offered to seek an agreement with the general unsecured creditors for immediate pre-funding of the Section 4049 Trust to the extent of the projected value of the Trust's claim.

Moreover, in our role as a creditor, PBGC offered to agree with the general unsecured creditors on *additional* funding of the Section 4049 Trust, beyond the actual value of its claim and up to total funding of $150 million. Such an agreement would be in the interests of general unsecured creditors as a means of averting a potential strike by the United Steelworkers of America and thus conserving the value of the estate.

Finally, PBGC stated that it would accept the establishment of a traditional, future service, defined contribution plan for active employees who are participants in the Plans. As you know, such a plan could provide generous benefits to LTV's workers without running afoul of Title IV of ERISA.

Please reconsider this offer as a means of addressing the needs of participants and retirees and avoiding costly and unnecessary litigation.

Very truly yours,

/s/ Royal S. Dellinger
ROYAL S. DELLINGER
Deputy Executive Director

cc: Michael Crames, Esq.
Karen Wagner, Esq.
Lynn Williams

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Jul. 23, 1987

Lynn Williams
President
United Steelworkers of America
Five Gateway Center
Pittsburgh, Pennsylvania 15222

Re: Benefit Arrangements for Participants and Retirees in the Terminated LTV Steel Company Pension Plans

Dear Mr. Williams:

This letter sets forth the proposal made by the Pension Benefit Guaranty Corporation ("PBGC") during meetings with representatives of The LTV Corporation, LTV Steel Company (collectively, "LTV") and the United Steelworkers of America ("USWA") on July 10 and 13, 1987. The PBGC believes this proposal would provide immediate relief to retirees and participants in the terminated LTV Steel Company Pension Plans ("Plans") while complying with Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). The PBGC remains willing to implement this proposal if it is accepted by LTV and the USWA.

As PBGC has informed USWA representatives, Section 4049 of ERISA provides for the establishment of a trust to pay benefits to participants in terminated plans in addition to the amounts paid by PBGC. The Section 4049 Trust provides up to 75 per cent of the difference between the benefit paid by PBGC and the benefit provided under the plan. To alleviate the hardship of participants whose benefits have been reduced as a result of termination of the Plans, PBGC offered to appoint immediately a trustee of the Section 4049 Trust, who would have the authority to collect amounts owed the

Section 4049 Trust under Section 4062(c) of ERISA. The total amount of the Section 4049 Trust's claim is approximately $150 million.

Because The LTV Corporation, LTV Steel Company and certain other entities liable to the Section 4049 Trust are in Chapter 11, payments to the Section 4049 Trust would otherwise be included in a plan of reorganization to be proposed at some future date, thereby significantly delaying any payments from the Section 4049 Trust. Therefore, the PBGC offered to seek an agreement with the general unsecured creditors for immediate prefunding of the Section 4049 Trust to the extent of the projected value of the Trust's claim.

Moreover, in our role as a creditor, PBGC offered to seek agreement with the general unsecured creditors on *additional* funding of the Section 4049 Trust, beyond the actual value of its claim and up to total funding of $150 million. Such an agreement would be in the interests of general unsecured creditors and PBGC as a means of ensuring labor peace and thus conserving the value of the estate.

Finally, PBGC would accept the establishment of a traditional, future service, defined contribution plan for active employees who are participants in the Plans. As you know, such a plan could provide generous benefits to LTV's workers without running afoul of Title IV of ERISA.

Please reconsider this offer as a means of addressing the needs of participants and retirees and avoiding costly and unnecessary litigation.

Very truly yours,

/s/ Royal S. Dellinger
ROYAL S. DELLINGER
Deputy Executive Director

cc: Raymond A. Hay
Bruce Simon, Esq.

[PBGC Logo]
Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

July 23, 1987

Office of the Executive Director

James F. Powers
Senior Vice President and
Chief Financial Officer
The LTV Corporation
2001 Ross Avenue
Dallas, Texas 75265-5003

Re: Benefit Arrangements for Participants and Retirees in the Terminated LTV Steel Company Pension Plans

Dear Mr. Powers:

I was surprised at your inability to recall at the Bankruptcy Court hearing on July 16, 1987, the specific proposal made just a few days earlier by the Pension Benefit Guaranty Corporation ("PBGC") to address the needs of retirees and participants in the four terminated LTV Steel Company Pension Plans ("Plans"). Accordingly, I am writing to reiterate the proposal the PBGC made repeatedly during our meetings on July 10 and 13, 1987.

PBGC offered to appoint immediately a trustee under Section 4049 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), who would have the authority to collect amounts owed the Section 4049 Trust under Section 4062(c) of ERISA. These amounts, up to 75 per cent of "outstanding benefit commitments" under the Plans (*i.e.*, 75 per cent of the gap between guaranteed benefits and full benefit commitments), would be paid to participants in addition to the benefits paid by the PBGC. As you know, the total amount of the Section 4049 Trust's claim is approximately $150 million.

Because The LTV Corporation, LTV Steel Company and certain other entities liable to the Section 4049 Trust are in Chapter 11, payments to the Section 4049 Trust would normally be included in a plan of reorganization to be proposed at some future date and would not provide all of the amounts claimed by the Section 4049 Trust. To eliminate this delay and to provide immediate payment to retirees under the Trust, the PBGC offered to seek an agreement with the general unsecured creditors for immediate pre-funding of the Section 4049 Trust to the extent of the projected value of the Trust's claim.

Moreover, in our role as a creditor, PBGC offered to agree with the general unsecured creditors on *additional* funding of the Section 4049 Trust, beyond the actual value of its claim and up to total funding of $150 million. Such an agreement would be in the interests of general unsecured creditors as a means of averting a potential strike by the United Steelworkers of America and thus conserving the value of the estate.

Finally, PBGC stated that it would accept the establishment of a traditional, future service, defined contribution plan for active employees who are participants in the Plans. As you know, such a plan could provide generous benefits to LTV's workers without running afoul of Title IV of ERISA.

I trust this refreshes your recollection.

Very truly yours,

/s/ Royal S. Dellinger
ROYAL S. DELLINGER
Deputy Executive Director

[LTV Logo]
The LTV Corporation
Senior Vice President
and Chief Financial Officer

July 24, 1987

Mr. Royal S. Dellinger, C.P.A.
Deputy Executive Director
Pension Benefit Guaranty Corporation
2020 K Street, N.W., Suite 7000
Washington, D.C. 20006

Dear Royal:

Ray Hay has asked me to respond to your letter of July 23, 1987.

As you know, LTV Steel Company and the United Steelworkers of America negotiated the 1987 labor agreement over the course of many months. The agreement covers a variety of areas, including the following: (1) contributions by active and retired employees with cost of health insurance; (2) a manning agreement securing a reduction of 517 jobs; (3) consolidation of certain crafts which will eventually eliminate an additional 220 jobs; (4) education and training programs; (5) a new joint policy review committee; (6) a process for revising work rules at the plant level; (7) extension of the LSE electro-galvanizing plan participative management program to other facilities; (8) a defined contribution plan for future service of active employees, with contributions varying, based on age and seniority; (9) an insurance benefit option for employees who die while in active service; (10) a disability insurance program; (11) an early retirement benefit option for employees who reach 30 years of service after January, 1987; (12) benefits for employees who lose their jobs as a result of future shutdowns or extended layoffs; (13) severance payment for certain employees based on seniority and shutdown effects; (14) a revised supplemental unemployment benefit program for employees affected by shutdowns; (15) hardship payments

to current retirees (approximately 8,000) of a portion, averaging 92.25%, of the retirement benefits they lost as a result of the PBGC's action terminating the pension plans on January 13, 1987.

Each provision of this agreement itself involves complex arrangements for qualifications, distribution, funding and other matters. Each of these programs is new to LTV and has been framed through the collective bargaining process in negotiations with the USWA.

Your comments both at our meetings in Washington on July 10 and 13, 1987, and in your letter, seem to refer solely to items 8 and 15 above. With respect to the new defined contribution program, your comments do not make clear whether the PBGC objects, and, if so, on what basis, to the specific provisions of the LTV-USWA contribution plan. With respect to item 15, hardship payments to current retirees, your comments about a section 4049 trust are confusing to us, as we tried to suggest to you in our earlier discussions. First, nothing prevents the PBGC from appointing a 4049 trustee as the statute requires. Yet to date, although it has been more than six months since the plans were terminated, the PBGC has not taken action to activate this trust. Our agreement with the USWA provides that the contract benefit is offset by any equivalent benefit paid from a 4049 trust. Thus, the labor agreement anticipates and accommodates your comments. Second, your comment fails to address the payment we have agreed to make to current retirees in addition to the 75% payment which could be made by a 4049 trust, if one were appointed and the trust were funded.

Further, we have asked you repeatedly during the discussions in Washington whether and on what basis you can object to other provisions of the agreement including, for example, insurance programs for disabled workers or insurance benefits for widows, severance payments to the victims of shutdowns, supplemental unemployment benefits, the cost sharing gains from health insurance; the

manning and craft consolidation agreements or the other parts of this elaborate agreement. We have not received a response on these points. Your repeated suggestion that the LTV-USWA labor agreement is "substantially equivalent" to the terminated pension plans is plainly incorrect, as the information we have provided you demonstrates. Your point ignores the multiple differences in level of benefit, eligibility, funding, investment risk and structure of these diverse provisions in the 1987 agreement. It also ignores the realities of bargaining pursuant to the requirements of law with the union representing our active and retired employees.

LTV Steel Company and the USWA negotiated this agreement after exceedingly difficult and lengthy bargaining. The agreement remains subject to ratification by the rank and file of the United Steelworkers. If the contract is ratified, we intend to keep our part of the bargain. Consistent with that, I will repeat that we are prepared to discuss with you any thoughts you may have concerning different mechanisms for delivering the benefits we have contracted to provide. As Judge Lifland found last week, the 1987 labor agreement is a good contract for the company, its creditors, (including the PBGC) its active and retired employees and its shareholders. The costs of the new benefits are substantially offset with savings from other portions of the agreement. The contract promotes our prospects for a successful reorganization. It also assures labor peace for the reorganization.

If your agency has suggestions about the methods to provide these contractual benefits or the means of achieving these negotiated cost savings, we will be pleased to discuss them with you.

In addition as we have throughout these many months, we are always ready to meet with you, to talk about your

concerns, your position in the Chapter 11 proceeding and any other matters you wish to raise.

Sincerely yours,

/s/ J. F. Powers
J. F. POWERS

cc: Lynn Williams

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C.
20006-1806

Office of the Executive Director

Jul. 24, 1987

Honorable Dan Quayle
United States Senate
SH-524 Hart Office Building
Washington, D.C. 20510

Dear Senator Quayle:

Enclosed are copies of letters to Lynn Williams and Raymond Hay reiterating the Pension Benefit Guaranty Corporation's ("PBGC") proposal to provide immediate relief to retirees and participants in the terminated LTV Steel Company Pension Plans ("Plans") while complying with Title IV of the Employee Retirement Income Security Act of 1974, *as amended*. PBGC made this proposal to representatives of The LTV Corporation, LTV Steel Company (collectively, "LTV") and the United Steelworkers of America ("USWA") during meetings on July 10 and 13, 1987. If it is accepted by LTV and the USWA, the PBGC remains willing to implement the proposal.

The PBGC believes its offer addresses the needs of participants and retirees and avoids costly and unnecessary litigation.

Very truly yours,

/s/ Kathleen P. Utgoff
KATHLEEN P. UTGOFF
Executive Director

Enclosure

[LTV Logo]

The LTV Corporation
Senior Vice President
and Chief Financial Officer

July 27, 1987

Mr. Royal S. Dellinger, C.P.A.
Deputy Executive Director
Pension Benefit Guaranty Corporation
2020 K. Street, N.W.
Washington, D.C. 20006-1806

Re: Your July 23, 1987 Letter to me on the Subject of Benefit Arrangements for Participants and Retirees in the Termination LTV Steel Company Pension Plans

Dear Royal:

Last Friday at Ray Hay's request I request I responded to the letter which you sent to him on the above referenced subject which we had received via telecopy from our outside counsel. Inasmuch as the letter you sent to me appears to be identical to the Hay letter except for the opening and closing paragraphs, I will not, in this letter, reiterate my earlier response. The purpose of this letter is to respond to the comments in your letter which were directed at me personally.

Royal, I doubt the surprise expressed in your letter could approach the level of my surprise at receiving it. While it is certainly true that the parties, among other things, discussed the use of 4049 trust and defined contribution plans I left those meetings, as did the other LTV participants and outside professionals, with the distinct impression that no meaningful comprehensive proposal was made by the Pension Benefit Guaranty Corporation. We reached this conclusion for the following reasons:

1. Your refusal to deal on an item by item basis with the various facets of the complex agreement which was negotiated between LTV Steel and the

United Steelworkers of America. I believe the PBGC representatives effectively told us the overall agreement reached by the parties was not acceptable but offered us no suggestions on dealing with the specifics of the settlement on an item by item basis.

2. Gary Ford made it very clear at both the July 10th and 13th meetings that nothing was on the table unless a total agreement was reached. Quite frankly, he mentioned this so many times at the meeting on July 13th I thought he was doing so to warn the company and the United Steel Workers of America against alleging to other parties that the PBGC was agreeable to anything.

Royal, as you well know the LTV Chapter 11 case is extremely complex and has imposed significant burdens on those people both within and without the company who are either affected by it or who must deal with it. For my part, I have tried to deal fairly with each of the numerous parties who have an interest in the case and will continue to do so with the PBGC. While your comments will not prevent me from continuing this process they will obviously dictate a more formal approach on any discussions and/or negotiations in which we engage.

Very truly yours,

/s/ J. F. Powers
J. F. POWERS

SUMMARY

[USWA Logo and Pictures Omitted in Printing]

Proposed Agreement
United Steelworkers of America

and

LTV Steel Company, Inc.

August 1987

Introduction

To All Active and Retired USWA Members Employed by LTV Steel Corp. and Its Predecessor Companies:

"The test of a union is not in periods of prosperity, but in times of adversity."

—Philip Murray

During our periods of prosperity, The United Steelworkers of America (USWA) fought to achieve the highest wages and the best benefits in industrial America. Since 1982, our industry, the steel industry, has gone through times of adversity worse than the Great Depression of the 1930s.

Now the USWA is fighting to preserve as much as we can of the gains we made earlier . . . and struggling to survive until prosperity returns. The LTV Steel bankruptcy is one of our major adversities.

This booklet describes a tentative settlement which has been negotiated with LTV Steel Corp. We urge you to read it carefully—and then judge for yourself what course of action you wish our union to take.

In a separate mailing, the active members will receive ballots shortly after the bankruptcy court approves our proposed agreement. The vote is really between two choices—to accept this settlement or to fight on the streets to try to improve it.

The decision must be made now. USWA active members will shoulder the burden of the fight. Accordingly, the USWA Constitution and policy resolutions provide that active members alone make that decision.

This is not a contract we chose to negotiate voluntarily. But if we had *not* negotiated, we would have put your fate into the hands of the bankruptcy judge, who has the authority to permit LTV Steel to unilaterally impose new terms and conditions. The results could have been disastrous.

[Picture Omitted in Printing]

[Caption:] *Members of the USWA LTV Negotiating Committee at LTV Steel (first row seated, left to right) are: Ken Saltz, Massillon; Rudy Kogut, Canton; Gary Bone, Gadsden; Ray Gladys, Cleveland; Mike Cable, Nitro, W.Va.; Dave Anderson, Massillon. In the first row, standing are: Bob Kovacevic, director, USWA Collective Bargaining Services (left); Al Forney, Cleveland (right). In the second row, seated, left to right, are: John McGarry, Youngstown; Maury Richards, Chicago; Lou Chastain, Canton; Tony Francesco, Beaver Falls; Rick Zimmer, Hennepin; Richie Vallecorsa, Aliquippa. In the back row, standing, left to right are: John Sako, Indiana Harbor; Matt Turner, ore mines; Jim Smith, USWA assistant to the president; Tony Rainaldi, director, USWA District 20; Joe Coyle, director, USWA District 27; Bill Burga, assistant to Coyle; Andy Toth, USWA benefits technician; Lou Vendetti, Cleveland; Gene Ghay, grievance chairman, Cleveland. (Several of the USWA/LTV Steel local union presidents were unable to be present when this photo was taken.)*

On June 25, 1987, the USWA Negotiating Committee voted 23-14 to submit this agreement to the active members with a recommendation for ratification. The International Executive Board has also approved that recommendation.

Earlier in June, the USWA Negotiating Committee requested each local union to authorize economic action by the active members if a satisfactory settlement could not be reached. Every local union approved that resolution during June meetings. In essence, the local union presidents' committee has determined not to take economic action if this tentative settlement is satisfactory to you—the active members. However, if you determine that it is not satisfactory, the committee will call on your support

in whatever action is necessary to force LTV and the creditors to agree to a more favorable settlement.

The reasons a majority of the committee recommend your approval of this settlement are as follows:

• WAGES—There will be *no reductions* in the present wages, or wage-related benefits, such as overtime, premium payments, incentives, etc.

• VACATIONS & HOLIDAYS—There will be *no reductions* in the present vacations or holidays.

• PENSIONS—A new pension system is created which, although *not* as good as our old pension, is by far the best which has been negotiated with any basic steel company in bankruptcy.

• RETIREE PENSIONS—The settlement restores most of the losses suffered by 8,000 retired LTV steelworkers retroactive to Feb. 1, 1987.

• INSURANCE—The health insurance benefits *will not be reduced*, although a small monthly contribution will be required from the profit sharing plan for active employees and directly from retirees. If profits are high enough, the pensioners' contributions for insurance will also be partially or totally reimbursed from our profit-sharing plan.

• OTHER INSURANCE—There will be *no change* in the life and sickness or accident benefits.

• WORKING CONDITIONS—To remain competitive, the present 20,000 workers in LTV plants will be reduced by approximately 500—by attrition only. *No employee will be laid off* as a result, or suffer any loss of earnings. Lump sum bonuses will be paid for early retirement, up to a maximum of $25,000.

• CONTRACTING OUT—There will be *no change* in the new contracting out provisions of the labor agreement.

• TRADE AND CRAFT—Where trade and craft combinations have not already been made, the company may offer certain combined craft jobs for bid in the future. The job security and seniority of any craftsman *who does not wish to promote* are fully protected.

• EDUCATION—For the first time ever, we have won company-paid education assistance for plant employees.

The majority of the USWA Negotiating Committee is convinced that we *cannot make further* improvements in this settlement without taking economic action. We have worked at these negotiations diligently for five months, and are convinced this is the best that can be done under the circumstances.

The USWA has compared the benefits of this tentative settlement with the alternative—*economic action now.* There are risks on each side of the comparison.

If we accept this settlement, the total number of employees will be reduced during the next year to two years by approximately 500—through attrition.

If we reject this settlement and take economic action, our active members will probably be in for a long struggle, as we were at Wheeling-Pittsburgh and at USX. We believe we will have the same legal arguments—such as what constitutes a lock out—but there is no guarantee that the courts will agree.

Furthermore, some of the marginal LTV plants, which employ approximately 3,700 active members, may not reopen after a long struggle. The majority of the committee believes that under these circumstances the best interests of the greatest number of active members will be served *by accepting* the tentative settlement described in this booklet.

Your USWA Negotiating Committee and the International Union believe that the settlement agreement de-

scribed in this booklet should be ratified by the active members. But you have the final voice.

Make no mistake. If this settlement is rejected by the majority, we have one course left. We all know what that is. But if we act, we must act promptly and we must be prepared for a long and bitter struggle. Your Union is ready to commit its total resources to such a struggle if that's what the majority decides.

We ask you to give your full support to the judgment of the majority, as we will do.

To deal with Steelworker problems during these times of adversity, we must stand united now, just as the men and women who built our Union were united in the past.

Sincerely and fraternally,

/s/ Lynn R. Williams
LYNN R. WILLIAMS
International President
United Steelworkers of America

/s/ Tony Rainaldi
ANTHONY RAINALDI
Director, District 20
Chairman
USWA Negotiating Committee
at LTV Steel Corp.

/s/ Joseph M. Coyle
JOSEPH M. COYLE
Director, District 27
Secretary
USA Negotiating Committee
at LTV Steel Corp.

[Picture Omitted in Printing]

[Caption:] *District 31 Director Jack Parton at Indiana Harbor announces victory in LTV insurance strike.*

Ratification Procedure

The tentative settlement will be submitted to the bankruptcy judge Thursday, July 16, 1987, by LTV and the USWA jointly. *The PBGC has announced that it will oppose the settlement.*

Some of the other creditors may also oppose the settlement, but we believe a majority of them will accept it. If the judge approves the settlement, the final decision will then be up to USWA active members.

Ballots will then be mailed under separate cover within the next week, along with instructions for completing and returning them. Please observe the deadline stated in the ballot information package, and make such your ballot is returned in time to be counted.

We urge you to read the information in this booklet carefully, attend the membership meetings that will be scheduled, and then vote. If you have any questions, contact your local union representative.

If a majority of the active members who vote determine to reject this settlement, then we will take economic action together, promptly. We have faced adversity together before, and we have defeated it. Your Union will continue to use its total resources, from the local level to the international headquarters to fight for your best interests.

If a majority of the active members who vote accept this settlement, it will become effective immediately. However, that may not be the end of our fight. The Reagan Administration may not be willing to accept the judgment of the court or the majority of our active members.

Dates in Proposed LTV Contract

Here are important dates in the proposed settlement:

• The USWA/LTV Steel labor contract becomes effective upon membership ratification. It specifically prohibits the company—for so long as LTV is in Chapter 11—from seeking bankruptcy court approval for further contract changes.

The contract will continue in effect until the company receives approval of its reorganization plan from the bankruptcy court and then emerges from bankruptcy—with a deadline of Feb. 15, 1990. If reorganization does not occur by that date, either side may ask for renegotiation of economic matters. If no settlement is reached by April 15, 1990, either side may resort to economic action.

• The defined contribution pension plan for active workers and changes in the SUB program are retroactive to Jan. 13, 1987.

• Restoration of pension benefits to retirees will be retroactive to Feb. 1. The money will be paid in a lump sum, minus the one-time hardship payment that was made in April.

• The "Insurance Agreement" and "Pensioners' and Surviving Spouses' Insurance Agreement" will be effective Oct. 1, 1987.

Contents

The USWA Negotiating Committee and the International Executive Board recommends ratification of the proposed agreement with LTV Steel Co.

A new pension agreement has been established for current LTV employees in addition to the monthly benefits from the regular pension (or 'frozen pension') paid by the Pension Benefit Guaranty Corporation (PBGC). The proposed agreement restores most of the losses suffered by present retirees.

There will be no change in the insurance benefits of any health, life or other insurance programs for either active employees or retirees, but small premium contributions will be required.

Where trade and craft combinations have not already been made, the company may offer certain combined craft jobs for bid in the future.

To remain competitive, about 500 jobs will be reduced by attrition only. No employee will be laid off or suffer any loss of earnings.

The 1986 Employee Investment Program (EIP) will be implemented promptly. The terms of the EIP are modified for 1987, 1988 and 1989.

Four major problems were faced by the USWA Negotiating Committee.

[USWA Logo]

Published by the United Steelworkers of America as a report on the proposed August 1987 agreement with LTV

Steel Company, which was mailed to about 20,000 employees who are members of the Union. This booklet was also mailed to about 45,000 retired employees of LTV Steel, who are represented by the USWA. The summary explanation about the proposed agreement was produced by technicians and staff members of the USWA's International Headquarters, Five Gateway Center, Pittsburgh, Pa. 15222.

New Pension Agreement/Background

The pension plans under the basic steel industry labor agreements have always been "defined benefit plans." This means that the company is obligated to provide full benefits of the plan, regardless of cost. The benefits are actually paid from a fund to which the company contributes.

In the late 1960s and early 1970s, our Union, and others, were concerned that many defined benefit plans were underfunded. Therefore, if a company liquidated, through Chapter 7 bankruptcy, its retirees and active workers might never get any pensions.

[Picture Omitted in Printing]

[Caption:] *The proposed new agreement provides substantial restoration for LTV retirees, with some recouping 100 percent of the monthly pension supplements terminated when the PBGC took over the pension plans.*

We took our problem to Congress and achieved passage of the Pension Reform Act, which created the Pension Benefit Guaranty Corporation (PBGC). The Internal Revenue Service is supposed to oversee the funding of plans, and the PBGC provides insurance for most of the benefits under such plans.

The federal government has not done a good job of requiring adequate funding of defined benefit plans under the Reagan Administration. Nevertheless, the PBGC is

still required by Congress to provide insurance guarantees for the benefits of plans which are terminated.

When the PBGC terminated your pension plans on January 13 of this year, it took the responsibility of paying your pension earned up to that date, subject to its rules.

Your Frozen Pension:

In this booklet we will use the term "*frozen pension*" to refer to the pension PBGC will pay you (or if you are retired, what the PBGC is now paying you).

If you are still an active worker, the *amount* of your frozen pension is the same as it would have been if you had been eligible to retire on January 13, 1987, and is calculated the same way our prior pension agreement provided for. Therefore, your minimum frozen pension would be $17.50 per month per year of service as of Jan. 12, 1987 up to 15 years; $19 per month for each year of service from 15 to 30 years; and $20.50 for each year of service over 30.

Examples of minimum frozen pensions are shown below:

EXAMPLES:

FROZEN PENSIONS

Service at 1/12/87	Minimum Frozen Monthly Pension
10 years	$175.00
15 years	$262.50
20 years	$357.50
25 years	$452.50
30 years	$547.50
35 years	$650.00

Your frozen pension could be higher than the minimum amount if your earnings were high enough, as a result of the percent pension formula negotiated under our prior pension agreement.

Your frozen pension will be subject to the maximum payable by the PBGC at your age of retirement. For those who were already retired on January 13, 1987, the PBGC maximum was calculated on the basis of their age (or their spouse's age) on January 13, 1987. Approximately 500 out of 44,000 retirees are affected.

The PBGC monthly maximum benefits for retirement at age 50 or higher are shown below.

Maximum Benefits

Age	PBGC Maximum
65	$1,858
64	$1,728
63	$1,598
62	$1,468
61	$1,338
60	$1,208
59	$1,133
58	$1,059
57	$ 985
56	$ 910
55	$ 836
54	$ 799
53	$ 762
52	$ 725
51	$ 687
50	$ 650

When PBGC Pays Your Frozen Pension:

• At any age, if you had 30 or more years service *on or before* 1/12/87 and retire.

• At age 62, if you retire on or before age 62, or at time of retirement if later than age 62, for most workers.

• At age 65, if you had less than 40 years of age or 15 years of service on 1/12/87.

When PBGC Will Not Pay a Frozen Pension:

PBGC will *not* pay a frozen pension to the following groups of employees *until* they become age 62 or 65, as spelled out above:

• Employees who complete 30 years of service after 1/12/87.

• Employees who become disabled after 1/12/87.

• Employees caught in shutdowns after 1/12/87.

Although PBGC will pay Spouses' Pension to spouses of *retirees* who die, PBGC will *not* pay Spouses' Pensions to widows of active workers who die after 1/12/87.

PBGC will *not* pay any frozen pensions to employees who had less than 10 years' service on 1/13/87, as they were not vested under PBGC rules.

Finally, PBGC does *not* pay pension supplements to those retired before 1/12/87 on 70/80 or Rule of 65 pensions.

New Pension Agreement:

Since PBGC terminated the LTV Steel pension plans, the PBGC will not now insure the benefits of any new defined benefit pension plan for LTV Steel employees. This has been our major problem in negotiating a new pension agreement.

We have had a team of highly trained actuaries and attorneys working with the Union's pension experts and the USWA Negotiating Committee through months of meetings with LTV, trying to solve this and other problems.

Out of those meetings has come a new pension agreement which we believe provides the greatest possible security for benefits which can be obtained under the present law.

Enclosed with this summary explanation is a separate booklet sent to active members only entitled **"Special Benefit Programs."** In it, you will find other new features of the pension agreement contained in this tentative settlement. They are:

- Disability Pensions
- Widows' Pensions
- 30 and Out Pensions
- Shutdown Benefits

A new "defined contribution plan" is described in the following section of this booklet to provide pension benefits for service *after* January 12, 1987.

On page 5 of this booklet is a full explanation of monthly benefits we negotiated for the 8,150 retired steelworkers who lost supplements, or parts of their regular pensions, when PBGC terminated the Plan on January 13, 1987.

Retiree Benefit Restoration

One of the most severe aspects of the LTV bankruptcy has been the suffering the Pension Benefit Guaranty Corp. imposed on 8,150 retirees when it terminated the pension plans.

The PBGC has denied these retirees their $400 monthly supplemental pension benefits and/or reduced their regular pension benefits.

This agreement provides substantial restoration, with some retirees recouping 100 percent, retroactive to Feb. 1. There will be a deduction to recover the hardship payment that was made in April.

Here is the schedule:

- Those retirees who are receiving $550 or more per month from the PBGC will recover 90 percent of their losses.
- Those retirees who are receiving between $400 and $549 per month will recover 95 percent.
- Those retirees receiving less than $400 will receive 100 percent restoration.

Folowing are some typical examples, with pre-termination benefits listed first:

1. **A 70/80 retiree with a base benefit of $600 per month and a $400 supplement until age 62.** PBGC will continue paying the $600. LTV will pay $360 (90 percent of $400) until age 62, for a total of $960 per month. This is equivalent to 96 percent of the pre-termination benefit.

2. **A 30-year-and-out retiree, age 52, with an $800 monthly base benefit.** PBGC pays $725 for life. LTV pays $68 per month (90 percent of $75) for life. The total benefit of $793 is 99 percent of pre-termination benefits.

3. A Rule of 65 retiree with a $300 base benefit and $400 supplement until age 62. PBGC pays $300 for life. LTV pays $400 until age 62, for a total benefit of 100 percent.

The maximum restoration by LTV is $1,200 per month.

Defined Contribution Plan

If you retire any time in the future, you will receive a monthly annuity based upon your service *after January 12, 1987*, in addition to your frozen pension from the PBGC. This annuity will be purchased for you from an insurance company with the money accumulated in an individual trust fund account in your name.

The new pension agreement in this tentative settlement spells out the amount LTV must pay in each month for you. The money will be invested by investment managers hired by a "Joint USWA-LTV Committee." When you retire, you will be given the option of various types of annuities you can purchase with the money in your account.

EXAMPLE:

An employee who had 15 or more years' service on January 13, 1987, who earns the current LTV average hourly pay under our contract until retirement, and who takes a 50 percent joint and survivors' option, could receive the following annuities, depending on his age on January 13, 1987:

	Monthly Annuity	
Age on 1/13/87	Retirement at Age 62	Retirement at Age 65
35	$907	$1,278
40	682	981
45	482	715
50	311	489
55	168	300

An employee whose earnings were above average could receive more, and an employee whose earnings are below average could receive less. The actual monthly annuity will also depend upon the earnings of the trust fund.

In this example, because it is based on a 50 percent joint and survivors' option, if the pensioner dies his widow

would receive one-half of the amounts shown for life, from his annuity.

The preceding example is calculated on the assumption of 7 percent annual rate of earnings of the trust fund. Benefits could be higher if the trust fund earns more than 7 percent per year interest, or lower if the fund earns less.

The benefits under this Plan will not be insured by the PBGC. They will be *"guaranteed"* in the sense that the company *must* pay contributions for these benefits each month to a Trustee. The trustee will be a major bank which will be legally responsible for protecting the funds until each employee retires, dies, or terminates.

Contributions To The Fund

Retroactive to January 13, 1987, the company will contribute a minimum amount to the Fund for your account, based upon your age as of January 1 of each year. The following table shows the minimum amount:

Age as of January 1	Amount Per Hour
Under 30	$ .21
30-34	.29
35-39	.38
40-44	.49
45-49	.62
50-54	.78
55-59	.96
O and over [sic]	1.14

If you have 15 years of service since your date of hire, as of January 1, of any year, you will be eligible for a higher contribution based upon earnings. To calculate this contribution, the company will determine your earnings rate for each pay period and multiply that rate by the number of hours you were paid in the pay period, up

to 40 hours per week. The resulting amount for the pay period will then be multiplied by a percentage based upon your age to determine your maximum contribution. The percentage table is as follows:

Age as of January 1	Percent of Earnings
Under 35	3.0%
35-39	4.0%
40-44	5.0%
45-49	6.0%
50-54	7.0%
55-59	8.5%
Over 59	10.0%

If the maximum contribution is higher than the minimum contribution, the higher amount will be paid into your account.

Most plans of this type require contributions only for the hours you actually work. That's good when you work overtime, but bad if you are off because of sickness or layoff. Under this plan, your contributions will be based on 40 hours per week, *including weeks of sickness or layoff up to 2 years.* Workers off due to occupational disability may have contributions made even longer.

Administration Of The Trust Fund

As stated above, the company will contribute to each employee's account monthly. If it fails to do so, the Union can file a lawsuit in court and collect a contribution due plus a penalty of 5 percent, plus 1 percent for each week of delay after five weeks. Any penalty payments will be added to each employee's account.

You will receive an annual report showing your account balance and the approximately annuity it would provide.

Any dispute as to your account balance, eligibility for benefits, etc. will be processed in the grievance and arbitration procedure.

A "Joint USWA-LTV Committee" will select the Trustee for the Plan, make the investment policy, select investment managers, and select insurance companies to bid on the annuities.

How Benefits Will Be Paid

You may elect to receive up to $10,000 cash from your account whenever you retire or terminate. The balance will be paid to you in an annuity, unless it is below $3,500. In this case, the Trustee may also pay it in a lump sum.

You will have a number of options to purchase an annuity with your account. You and your spouse may elect a monthly income for the rest of your life, with or without an option for a guaranteed minimum payment in the event of your early death. Or, you may receive a "Joint and 50 percent Spouse Annuity." With it, you receive an actuarially reduced monthly benefit for life and, upon your death, your surviving spouse gets 50% of what you received.

If you terminate before you wish to retire, you can also elect to leave your money in your account to earn interest, and then purchase an annuity when you retire.

If you die before you retire, your spouse receives the full value of your account, with the same cash options as you would have had. Your spouse may also be entitled to a "Pre-Retirement Surviving Spouse Benefit" discussed more fully in the "Special Benefit Programs" booklet, which was sent to active members at LTV.

If you are single, you may designate a beneficiary to receive your account.

Vesting In The Plan

You are probably already vested. You only need 5 years of service, *including service before January 13, 1987* to vest. A new employee's account will also be vested if he dies or becomes disabled before earning 5 years of service.

Employees With No Frozen Pensions

As mentioned above, employees who had less than 10 years of service on January 13, 1987, were not vested under the prior pension plan in the eyes of the PBGC, and will receive no Frozen Pensions. Their contributions into the new trust fund will be 1½ times the minimum formula for the number of months equal to the number of months of service they had *before* January 13, 1987.

Supplemental 401(k) Plan

The new pension plan will have a supplemental tax-free 401(k) Plan with it. Beginning in January, 1988, you can transfer up to 10 percent of your earnings, or $7,000 per year, whichever is less, into the 401(k) Plan.

In addition, you may elect to put all or part of your profit sharing distributions in your 401(k) account.

You can collect from your 401(k) account in any combination of cash or annuities when you quit, die, retire, or reach the age of 59½. You will also be able to borrow against your 401(k) account. A full explanation of the 401(k) account wil be provided to you before January 1, 1988.

Retiree Insurance

The "Program of Insurance Benefits" under the prior insurance agreement between the Union and LTV is continued under this tentative settlement. Therefore, an employee who retires will be eligible for retiree health and life insurance under the same eligibility rules as the prior agreement.

However, if an employee terminates before reaching eligibility for retirement under the prior agreement, retiree insurance will not be provided, even though the employee will receive cash and/or an annuity from the trust fund account.

Insurance Benefits

The company demanded early in these negotiations that our "Program of Insurance Benefits" for active and retired steelworkers be slashed drastically, as LTV Steel had already done to the non-union employees' insurance plan.

The USWA Negotiating Committee absolutely refused to consider any reduction of benefits.

Although we finally had to agree to small monthly contributions, the union position prevailed on the benefits issue.

There will be *no change* in any of the benefit provisions of any of the health, life or other insurance programs for either active employees or retirees, under this proposed settlement.

Contributions By Active Employees:

The amount of contributions towards insurance premiums for both active employees and most retirees will be $26.82 per month, *beginning October 1, 1987.*

The active employees' contribution will be paid out of the profit-sharing pool, on an annual basis. It will *not* be paid out of employees' pay checks.

In any year in which the profit sharing pool is not large enough to pay the contributions, they will go unpaid until the profit sharing pool is large enough in a future year to pay them.

Contributions By Retirees:

Retirees or surviving spouses whose monthly retirement income from LTV and PBGC is less than $200 will pay no contribution. Those whose monthly retirement income is more than $200 but less than $226.82 will pay the difference, out of their pensions. Those whose monthly retirement income is greater than $226.82 will pay $26.82, out of their pensions, under this tentative settlement.

[Picture Omitted in Printing]

[Caption:] ***Last July, USWA President Williams authorized a work stoppage at LTV's Indiana Harbor Works to fight the termination of insurance benefits (above). Frank Valenta, director of USWA District 28, led a demonstration in Cleveland (right).***

If profits exceed $200 million in any year, 10% of the profits above $200 million will be used to reimburse retirees for contributions they have made during that year.

Coverage of Insurance Programs:

In general, coverage of the active and retired insurance programs will be the same as in the past.

Retirees or surviving spouses who prove that they have other group coverage (either through their spouses's [sic] employer or another job) may elect out of the retiree health insurance program. When the other group coverage is no longer available, the individual will have 30 days to return to the retiree program. The monthly contribution of $26.82 will only be due when the individual is covered under the program.

During November 1987, pensioners and surviving spouses will have a one-time opportunity to enroll in the "Optional Major Medical Program." This coverage, if elected, will become effective on January 1, 1988. The monthly cost for Optional Major Medical is *in addition*

to the $26.82 monthly contribution for Basic Hospital and Medical coverage.

There will also be a one-time open enrollment period for HMOs in November 1987. For those who elect an HMO, coverage will be effective January 1, 1988. Remember, if there is an additional charge for a particular HMO, that amount will be deducted from monthly pension payments.

[Picture Omitted in Printing]

[Caption:] *USWA President Lynn Williams (seated, second from left) testified before a U.S. Senate committee in April to criticize the LTV Steel decision to terminate retiree insurance benefits.*

Trade & Craft; Jobs & Protections

In an array of protections for affected employees, the tentative agreement enables the company—where it has not done so already—to install 10 of the combined and/or expanded trade or craft jobs established in our 1986 negotiations, unless LTV has locally agreed otherwise.

The Union conducted talks on this subject with one overriding concern—any change must *benefit* our members, not victimize them. So we wrote these safeguards:

• Trade and craft workers who have the skills to meet the challenges of new technologies and equipment will be allowed to bid to those jobs if they wish to.

• Trade and craft workers who do not have the requisite skills must be given every opportunity to develop them if they wish to promote.

• And, above all, benefits accruing to the company because of these changes must be shared in by the workers, both in wages and employment security.

Here is a summary of the trade and craft proposal:

• A *"Joint Local Plant Implementation Committee"* will be established at each plant to consider all implementation matters.

• No current incumbent of a Source Craft Job will be laid off as the result of the establishment of an Expanded Trade or Craft Job under this agreement.

• In the event circumstances require a force reduction, seniority will prevail. For example, a junior incumbent of an Expanded Trade or Craft Job *will not* be retained over a senior incumbent of a Source Craft Job.

• A special payment of $3,000 will be made to a current incumbent of a Source Craft Job who promotes to an Expanded Trade or Craft Job.

• An *"Apprenticeship Training Program"* will be established by the company for all Expanded Trade or craft jobs.

• Training will be provided to permit employees to qualify for higher rates.

• Expanded Trade or Craft jobs will be [word illegible] by incentives.

• All current incumbents of Source Craft jobs will be given the opportunity to promote—*but they are not required to promote.*

[Picture Omitted in Printing]

[Caption:] *LTV steelworkers ratified an agreement in April 1986 with many features still preserved in the new proposal.*

The Settlement—How We Got There

Here's a review of the events which led us to reach this settlement.

• April 4, 1986—Active members accept heavy sacrifices in hopes of keeping LTV out of bankruptcy.

• April-June, 1986—Demand for steel falls, orders decline sharply and steel prices drop even more notwithstanding new labor agreement. LTV unable to renegotiate its debts.

• July, 1986—Company files Chapter 11 bankruptcy, cancels iron ore, coal, other raw materials and power contracts.

• July, 1986—The company causes major confrontation by cancelling retiree health and life insurance. In response, President Williams immediately authorizes a phased work stoppage beginning at the Indiana Harbor Works. As Cleveland and Hennepin prepare to join the stoppage, LTV agrees to restore retiree insurance retroactively. Some of the creditors oppose bankruptcy court approval of the restoration and appeal to the federal district court.

• September, 1986—LTV Steel faces a $215 million payment obligation to its pension funds due on the 15th. Union representatives on the bankruptcy Creditor's Committee learn that the creditors and the judge will not approve the loans needed to meet that payment. IRS and the Pension Benefit Guaranty Corporation (PBGC) propose actions leading to termination of pension plans.

• October, 1986—Union urges IRS and PBGC to stay their hand while we negotiate. We begin discussions with LTV for a new pension program to take effect if existing plans are termiated. Company proposes wholly unsatisfactory pension program and in addition demands as part of this bargain, drastic reductions in active and retiree health insurance benefits. Union refuses company demands.

• January 13, 1987—PBGC terminates your pension plans.

• January 15 to date—Union files suit on behalf of active employees and retirees against LTV for the difference

between PBGC payments and benefits promised by the pension agreement. Bankruptcy judge indefinitely postpones decision and insists, instead, that Union negotiate settlement with company and its creditors.

Manning & Employee Protection

One of the most difficult issues confronting the USWA Negotiating Committee was the company's insistent demand for extreme measures designed to reduce man-hours per ton.

From the very start of our negotiations, LTV Steel sought the unilateral right to slash the numbers of employees in non-craft jobs with virtually no restraints or protections. To make matters worse, the company pressed for the added freedom to eliminate break time, lunch periods, and a host of other "local working conditions." In all, the company demanded authority to eliminate roughly 700 employees throughout the company.

In the face of these demands, your negotiating committee went to work. We fought LTV's extreme positions as rationally and humanely as possible. The Union's emphasis was on limiting the company's proposals and at the same time securing a package of employee protections and inducements that would preclude layoffs as a result of this agreement, pay attractive bonuses, and include a variety of protections. The result is a *"Manning and Employee Protection Agreement."*

First, we backed LTV off its demand for extensive work rule changes and confined the discussions to manning reductions only.

Second, we secured the principle that a *voluntary* job departure *must* occur *before* any job can be reduced. This means quite simply that no employee can be laid off as a result of the manning agreement. On this point, the tentative agreement speaks in plain language: "no

permanent or temporary employee will be laid off as result of implementation of this [manning] agreement."

Third, to assure voluntary departures, the agreement creates a new severance benefit for those eligible employees who wish to depart their jobs and accept a cash payment of up to $25,000, plus continued insurance rights.

Fourth, we demanded that the company reduce its overall manning "bogey" or target by almost 30 percent. Throughout the entire corporation, this voluntary, no-layoff program will result in a reduction of approximately 500 non-craft employees, not the 700 originally sought by the company.

Fifth, this final company proposal for a settlement pinpoints the specific jobs—the only jobs—that may be reduced under the manning agreement. In a separate sheet inserted with this booklet, the affected jobs in your local union are identified.

[Picture Omitted in Printing]

[Caption:] *LTV's efforts to cut jobs and wipe out work rules were dramatically halted in the proposed agreement.*

Sixth, we obtained a package of protections to assure that these manning reductions not only cause no layoffs, but will be accompanied by important protections in incentive and non-incentive earnings, incumbency rights, and job evaluations.

Seventh, we made sure that the company must eliminate a proportional number of management jobs which is equivalent to 2.6 percent.

Finally, in return for an agreement on this difficult issue, we exacted an important concession: the company cannot go back to the bankruptcy judge during the term

of this bankruptcy to seek any further modification or reductions of any part of our labor agreement.

Here are the important details on the "*Manning and Employee Protection Agreement.*"

Once the company proposes a manning reduction, it must hold off implementing it until a permanent vacancy has been created either by normal attrition after the date of this agreement in the affected unit or department, or by the acceptance of a cash severance bonus by an eligible employee.

The cash bonus is $1,000 per year of service with a maximum "cap" of $25,000. The bonus is offered to employees in three stages: first, to permanent employees in the affected unit; next, to permanent employees in the affected department; and finally, to employees plant-wide. At each of these three levels, seniority will determine who may receive the bonus.

The cash bonus may be received in a single lump sum, or divided equally between an immediate payment followed by another payment at the start of the next year. Those who are not eligible for an immediate pension will be eligible for up to two years of extended insurance coverage, depending on seniority.

If you accept a cash bonus, the company may keep you on the job for up to six months longer if your work is needed to assure continuity of operations.

As added protections, the tentative agreement assures employees who remain after a manning reduction that they will receive appropriate adjustments in incentive pay, that combined jobs will be re-evaluated under the CWS manual, and that seniority incumbency rights will be unaffected by the agreement.

The Manning and Employee Protection Agreement is a one-time understanding that sets no precedent and

affects no local practices except to the limited extent needed to implement the agreement.

Table A on this page identifies the local unions involved. Full details of the manning changes proposal are contained in a separate insert page sent to all active USWA members with this summary explanation.

TABLE A

Local Union No.	Reduction
185	35
188	147
1011	51
1033	4
1098	15
1124	33
1157	23
1179	15
1200	86
1211	13
1272	9
1331	14
1566	21
1843	17
2265	8
2327	1
2345	4
3127	1
7367	19
TOTAL:	516

Employee Investment Program (EIP)

The 1986 agreement between the USWA and LTV Steel imposed sacrifices on active steelworkers averaging $3.15 per hour. It also provided a profit-sharing and stock plan to restore as much as possible of those sacrifices.

How The Program Will Work:

Under the Employee Investment Program (EIP), steelworkers will share 10 percent of LTV Steel's first $100 million of pre-tax profits each year, and 20 percent of all pre-tax profits over $100 million. Whatever sacrifices are not recovered from profit-sharing are to be compensated for with $16.00 shares of a new *preferred stock* of LTV Steel, under Stock Ownership Plan.

After the stock is put in the EIP accounts each year a member can:

• Convert shares of LTV Steel *preferred* to an equal number of shares of LTV *common* at any time, and either sell or hold the *common*, and/or;

• *Leave preferred stock* in his account until termination of employment, and accumulate annual 5 percent dividends.

If the member converts his *preferred*, he can withdraw the common stock, or the cash it sold for, on any month two years or more after the *preferred* was contributed. If LTV common is selling for less than $16.00, as it is now, the member loses the difference by early withdrawal.

Preferred stock left in the accounts until termination of employment has a more secure value. When the member terminates, it will also be converted to LTV *common*. Then the *common stock* can *be withdrawn, or sold and* the cash withdrawn. In this case, however, the member has a *"shortfall right"* to any loss because the *common* sold for less than $16.00 a share.

[Picture Omitted in Printing]

[Caption:] *USWA active and retired members united behind union negotiators to gain protections from the impact of LTV's bankruptcy.*

The "shortfall" becomes a priority claim on the following year's profit-sharing pool.

Why Hasn't The 1986 EIP Worked?

The LTV bankruptcy caused serious legal problems in putting the EIP into effect. Corporate bankruptcy lawyers hired by the Union have been working to iron out these problems.

Our lawyers advise us they believe they have solved the various legal problems, and that a motion should go before the bankruptcy judge this month for stock to go into the accounts. When the stock is contributed, each member will get a report on his account.

Were Profits Actually Earned in 1986?

After it went into bankruptcy, LTV Steel began to show an *operating profit*. LTV should, because it is not making pension contributions for you, or paying interest on its debts. Furthermore, LTV canceled all of its raw material contracts and began buying coal, iron ore, and power at much cheaper prices.

All of these and other unpaid past and future obligations become claims in bankruptcy court. LTV put all claims, both past and future, on its books as expenses in mid-1986, along with the expense of shutting down facilities the company expected to close. As a result, it reported huge losses for 1986.

During 1987 negotiations the Union believed, at one point, that a small profit-sharing pool of $3 million should have been reported for 1986, if the bankruptcy-related expenses had been excluded from profit-sharing calculations. Our analysis of these costs showed, however, that those related only to 1986 were large enough to wipe out any possible profit.

If, in 1987 or any other year, LTV charges future expenses which would affect your profit-sharing, the company is on notice that we will arbitrate.

What Will Change In The EIP?

There will be *no changes* in the EIP with respect to 1986 sacrifices. The average employee who worked throughout 1986 should receive about 330 shares of LTV Steel *preferred stock* in his stock plan account in the near future.

During 1987 negotiations we were told again and again by members not to agree to any further cuts in wages—that if further sacrifices had to be made to get an agreement approved by the bankruptcy judge, we should negotiate to take it out of the Employee Investment Program.

The USWA did exactly that. As explained in the insurance benefits section of this booklet (see page 8), the EIP investments will be affected for 1987, 1988, and 1989 by the insurance contributions of $26.82 per month, after October 1st of this year.

The effects will be:

• Active employees' insurance contributions will come out of the profit-sharing pool, after all "*shortfall*" payments are made to prior retirees.

• In any year in which pre-tax profits of LTV Steel exceed $200 million, the 20 percent of such excess will be split, with at least 10 percent going in profit sharing to active employees and up to 10 percent going to reimburse retirees for the insurance contributions they made in the prior year.

If 1987 pre-tax profits exceed $235 million, active and retiree insurance contributions would reduce employee investments by about $5 million, or approximately 17 shares of stock per member. This is about 4.5 percent of the average employe's investment.

The effects in 1988 or 1989 are impossible to predict.

If profits are low, the effect would be similarly minimal. The maximum effect would be 70 shares per member in a year, when the profit-sharing pool averages $2,400 or more per active member.

Problems Faced at LTV

[Picture Omitted in Printing]

[Caption:] *Both active and retired steelworkers at LTV have big stakes in restoration of lost benefits with the proposed August 1987 labor agreement.*

Let's look at the problems the USWA Negotiating Committee confronted when it sat down to negotiate this proposed agreement with LTV Steel.

Major Problem I

Because the pension plans were terminated, active members faced these serious risks:

• No disability pensions for disabilities commencing after January 13, 1987.

• No pensions for the widows of active members who died after January 13, 1987.

• No pension credit for service after January 13, 1987.

• No immediate "30-and-Out" pensions for those who attained 30 years of service after January 13, 1987. (A Steelworker would have to wait until age 62.)

• No shutdown pensions for shutdowns after January 13, 1987.

Major Problem II

Termination of the pension plans has meant that 7,900 retirees with 70/80 and Rule-of-65 benefits lost supplements of $400 per month (in a few cases $300). Some 250 retirees lost part of their basic pension benefit because it exceeded the maximum amount guaranteed by PBGC for their particular age.

Major Problem III

Although pension plan termination imposed terrible hardships both on active employees and retirees, the judge had not allowed our lawsuit against LTV for compliance with the pension agreement to get off the ground. It took five months of Union effort just to get a partial hearing. We had to recognize that even if the Union ultimately won the pension lawsuit, it might turn out to be a hollow victory should the full collective bargaining agreement, including the pension and insurance agreements, all be rejected later in the bankruptcy process.

Major Problem IV

The future worsening of business conditions could push the company to seek rejection of our collective bargaining agreements and the right to impose stiff wage and benefit cuts that we have rejected in these negotiations. What's more, the legal climate in the New York bankruptcy courts is extremely hostile and labor contract rejection is more likely to succeed there than it might elsewhere. Accordingly one of our key goals was to safeguard against future attempts by LTV to reject the collective bargaining agreement and seek deeper concessions.

[Picture Omitted in Printing]

[Caption:] *USWA President Lynn Williams led a rally on the steps of the nation's Capitol April 1 to protest the impact on LTV steelworkers of corporate bankruptcy.*

The USWA Negotiating Committee concluded that consideration of these major problems dictated two strategic imperatives.

First, we had to negotiate a *full* new agreement covering pensions, insurance, wages and all other working conditions.

Second, we had to have an immediate rather than a postponed solution to our problems.

In the case of pensions, for example, we could not wait years for an uncertain court decision while active members and retirees suffered the pains inflicted by plan termination.

The fact that LTV is curently earning a profit (because of lower raw materials and interest costs, as well as higher prices) played into the USWA Negotiating Committee's bargaining strategy. Our chances were better now, than they would be if we were to postpone negotiations until LTV decided to force us into a contract rejection fight in the bankruptcy court.

The timing and economic circumstances would then be much more favorable to the company.

The USWA was mindful of the Union's Wheeling-Pittsburgh experience, where on contract rejection, our members were forced into the streets for 98 days to hold the total cost of concessions at $3.00 rather than $6.00.

As a solution, the USWA committee insisted on, and won an explicit commitment by LTV not to seek further contract changes for the entire duration of the bankruptcy.

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington,
D.C. 20006-1806

Sep. 18, 1987

MEMORANDUM

To: William DeHarde, Director
Insurance Operations Department

Gary Ford, General Counsel
Office of the General Counsel

From: IOD/OGC SEPPAA Trusteeship Working Group

Subject: Recommendation to Restore the Pension Plans of the LTV Steel Corporation

The revised minutes of the IOD/OGC SEPPAA Trusteeship Working Group meetings of August 6, 1987 and August 10, 1987 are attached.

Attachment

cc: IOD/OGC SEPPAA Trusteeship Working Group

[The attachment follows.]

IOD/OGC SEPPAA TRUSTEESHIP WORKING GROUP MINUTES OF THURSDAY, AUGUST 6, 1987

Attendees:

Angie Arnett, OGC	Robert Klein, CPD
Mark Blank, OGC	Al Rettig, ASD
Ray Collins, IOSD	Marvin Rosenblum, CPD
Valerie Dinkins, OGC	Alta Underwood, CPD
Robert Joy, IOSD	

The meeting of the IOD/OGC SEPPAA Trusteeship Working Group was commenced at 10:00 A.M. to consider the restoration of the LTV Steel Company Pension Plans.

Additional Attendees:

Gary Ford, OGC	Lonie Hassell, OGC
Bill Beyer, OGC	Scott McCulloch, OGC
Carol Flowe, OGC	Eugene Weinzweig, CPD
Dave Gustafson, CPRD	Tom Bleakney, M&R
Dave Gill, CPD	Robert Dezube, M&R

Background

The PBGC has involuntarily terminated the following pension plans sponsored by the LTV Steel Company, Inc.:

a. Republic Retirement Plan (Republic Salaried Plan);

b. Jones & Laughlin Retirement Plan (J&L Salaried Plan);

c. Jones & Laughlin Pension Plan (J&L Hourly Plan); and

d. Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Republic Hourly Plan).

At its meeting of September 16, 1986, the IOD/OGC SEPPAA Trusteeship Working Group (Group) recommended that the Republic Salaried Plan be involuntarily terminated pursuant to the provision of section 4042 of ERISA that requires PBGC to institute proceedings to terminate a plan which does not have assets to pay benefits that are currently due. The date of termination was September 30, 1986.

At its meeting of January 5, 1987, the Group recommended that the J&L Salaried Plan, J&L Hourly Plan and the Republic Hourly Plan (Plans) be involuntarily terminated due to the Plans' failure to meet minimum funding standards and to avoid unreasonable deterioration of the Plans' financial condition. LTV had asserted that "because LTV is in reorganization under Chapter 11 of the Bankruptcy Code, LTV can not and will not make contributions to the Plans to eliminate the accumulated funding deficiencies . . . and is not likely to have the ability, to fund the Plans for future years." Additionally, financial analysis presented to the Group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding standards. The date of termination of the Plans was January 13, 1987. (See minutes of IOD/OGC SEPPAA Trusteeship Working Group meetings of December 15, December 18, 1986 and January 5, 1987. These minutes include proprietary business information protected from disclosure by a Data Disclosure Agreement with LTV.)

Discussion

IOD requested that the Group make a recommendation on whether PBGC should restore the LTV Steel plans pursuant to section 4047 of ERISA.

Ray Collins set forth the agenda of the meeting:

1. Review the current facts;
2. Make a recommendation to the Director of IOD and the General Counsel concerning the restoration of the plans.

Subsequent to the termination of the Plans, LTV and the United Steelworkers of American (USWA) entered into a collective bargaining agreement which, among other things, establishes new employee benefit arrangements (follow-on plans). LTV will also establish follow-on plans for salaried employees. On July 16, 1987, the Bankruptcy Court approved the collective bargaining agreement and the new employee benefit arrangements for salaried employees. The follow-on plans, together with the guaranteed benefits paid by the PBGC, will provide substantially the same benefits as the terminated LTV Steel plans. PBGC opposed approval of the follow-on plans in bankruptcy court because they evade the asset allocation and employer liability rules and essentially continue the terminated plans by providing substantially the same benefits and by paying amounts in excess of PBGC's guarantee limitations. (See attached affidavits of Kathleen Utgoff and C. David Gustafson submitted with PBGC's opposition to LTV's application for bankruptcy court approval of the follow-on plans.) Consequently, the adoption of the follow-on plans is a violation of Title IV and an abuse of the termination insurance program.

The Group discussed the purposes of Title IV of ERISA, PBGC's duties and obligations under Title IV and SEPPAA's Declaration of Policy.

Ray Collins stated that it appears that LTV's financial situation has improved significantly since the Plans were discussed at the Group's earlier meetings. At that time, LTV stated that it could not and would not make contributions to the Plans, and financial analysis based on LTV's projections indicated that LTV would not be able to fund the Plans to meet the minimum funding standards. (See minutes of IOD/OGC SEPPAA Trusteeship Working Group meeting of December 18, 1986; attached letter from Frank Cummings to PBGC General Counsel dated December 16, 1986). Recently, LTV has agreed to make contributions to the follow-on plans. In addition,

information submitted by LTV to the general unsecured creditors committee indicates that LTV has substantially exceeded its business projections of operating income.

Robert Joy summarized the Group's previous meetings on the termination of the LTV Steel plans, providing an overview of the Group's actions and recommendations at each meeting.

OGC advised that section 4047 provides that PBGC may restore a terminated plan to the employer or plan administrator when it determines that restoration is appropriate and consistent with PBGC's duties under Title IV. The legislative history of section 4047 indicates that restoration is available to PBGC in circumstances it deems appropriate, including those where the circumstances which made termination appropriate have changed or where there has been an abuse of the termination insurance program. OGC advised that PBGC has discussed section 4047 in published opinion letters concerning attempts by companies to establish abusive follow-on plans.

CPRD provided an analysis of the LTV follow-on plans. Based on information LTV supplied in its application for Bankruptcy Court approval of the follow-on plans (copy attached), the follow-on plans, together with the guaranteed benefits paid by PBGC under the terminated LTV Steel plans, provide substantially the same benefits as the terminated plans for participants and retirees and restore amounts in excess of PBGC's guarantee limitations. On average, for retirees, benefits paid under the follow-on plans, plus benefits paid by the PBGC under the terminated plans, will equal over 95 per cent of the benefits payable under the plans if they had not terminated. LTV has estimated that in the first year the cost of the follow-on union plans will be $70.8 million. The estimated cost of the follow-on plans for salaried employees would be approximately 20 to 25 per cent of the cost of the follow-on plans for union employees. The actuaries stated that these estimates are based on incomplete information sup-

plied by LTV with respect to assumptions and underlying facts (e.g., participant data, planned shutdowns).

The actuaries provided estimates of what the minimum funding costs would be if the LTV Steel plans were restored with and without contribution waivers from IRS.

The meeting was recessed at 11:45 AM and resumed at 1:30 PM.

The Group reviewed the attached trial transcript of the July 16, 1987, Bankruptcy Court hearing on LTV's application for approval of the follow-on plans, including the statements of an officer of LTV Steel regarding future shutdowns of LTV Steel facilities.

The Group discussed the restoration of the Republic Salaried Plan. That plan was terminated under the provision of section 4042 which requires termination by PBGC. The Group was informed that the contribution required to meet the minimum funding standard is approximately equal to the total annual benefit payments from the Republic Salaried Plan. However, there is remaining exposure for lump-sum payments to active participants in an undetermined amount. Finally, PBGC expects to recover the entire amount of the plan asset insufficiency arising as a result of termination of the Republic Salaried Plan. The group decided to defer further discussion of the Republic Salaried Plan.

The meeting was adjourned until Monday, August 10, 1987, at 10:00 AM.

The meeting of the IOD/OGC SEPPAA Trusteeship Working Group concerning the restoration of the LTV Steel pension plans was resumed at 10:00 AM, August 10, 1987. The following members were present.

Angie Arnett, OGC	Valerie Dinkins, OGC
Al Rettig, ASD	Mark Blank, OGC
Robert Joy, IOSD	Marvin Rosenblum, CPD
Ray Collins, IOSD	Robert Klein, CPD
Alta Underwood, CPD	

Additional Attendees:

Bill Beyer, OGC	Scot McCulloch, OGC
Gene Kalwarski, M&R	Eugene Weinzweig, CPD
Robert Dezube, M&R	Ron Gebhardtsbauer, ASD

Representatives from M&R provided additional information concerning the costs of the follow-on plans and the terminated plans. LTV estimates the total annual cost of the hourly follow-on plans for the first year of operation will be $70.8 million. The projected total annual cost for the first year of the follow-up plan to the J & L Salaried Plan is approximately $10-$15 million. M&R advised that, based on a USWA newsletter, LTV is expected to make up in 1987 wage concessions made in 1986, in the amount of about $90 million, in contributions to a separate profit sharing and stock ownership program for the benefit of USWA employees.

The M&R actuaries revised the estimates of minimum funding contributions required upon restoration that they provided at the August 6, 1987, meeting. Contributions owed to the two hourly plans for the 1986 plan year are estimated to total $160 million and the estimated contribution owed to the J&L Salaried Plan is $25 million, resulting in a total of $185 million. If waivers were obtained for the 1984 and 1985 plan years, the total annual contribution in 1987 is estimated to be between $195 and $200 million for the two hourly plans and $30 to $35 million for the J&L Salaried Plan.

CPD presented a financial analysis of LTV based on information supplied to the general unsecured creditors committees. (See report of CPD. This report includes proprietary business information protected from dis-

closure by a Data Disclosure Agreement with LTV.) The analysis indicated that the LTV Corportaion and the members of its controlled group will generate more than enough cash in the immediate future to support the Plans if restored. The analysis also indicates that LTV Steel alone would be able to fund restored plans in the near future; however, PBGC does not have sufficient data to predict LTV Steel's long-term cash flow with any certainty.

A motion was made and seconded to recommend restoration of the Plans to the employer or plan administrator, and to recommend appropriate action in the bankruptcy proceedings to reflect the restoration of the plans. The motion was based on (a) LTV's establishment of abusive follow-on plans which, together with the PBGC's guarantee, provide substantially the same benefits as the terminated plans and restore amounts in excess of PBGC's guarantee limitations; (b) the improvement in LTV's financial condition; and (c) LTV's demonstrated willingness to fund employee retirement plans. The Group decided that under the circumstances presented in this case, restoration is necessary to avoid abuse of the pension termination insurance program. The vote in favor of the motion was unanimous.

The Group decided not to include the Republic Salaried Plan in its recommendation at this time because PBGC expects to recover 100 per cent of the plan asset insufficiency for that plan, and because of the uncertain impact of the plan's exposure for lump sum payments on its ability to meet annual benefit payments from required minimum funding contributions.

[The attachments referred to in these minutes are reprinted at JA 226 (Utgoff affidavit), JA 231 (Gustafson affidavit), JA 125 (Cummings letter), JA 150 (LTV application to bankruptcy court to approve follow-on plans) (excerpts only), and JA 238 (July 16, 1987 hearing transcript) (excerpts only).]

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Aug. 12, 1987

To: William DeHarde, Director
Insurance Operations Department

Gary Ford, General Counsel
Office of the General Counsel

/s/ Robert Joy for

From: IOD/OGC SEPPAA Trusteeship Working Group

Subject: Recommendation to Restore the Pension Plans of the LTV Steel Corporation

This memorandum is to inform you that the IOD/OGC SEPPAA Trusteeship Working Group unanimously recommends restoration of the following plans to the employer or plan administrator:

a. Jones & Laughlin Retirement Plan (J&L Salaried Plan);

b. Jones & Laughlin Pension Plan (J&L Hourly Plan); and

b. Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Republic Hourly Plan).

The recommendation is based on:

a. LTV's establishment of abusive follow-on plans which, together with the PBGC's guarantee, provide substantially the same benefits as the terminated plans and restore amounts in excess of PBGC's guarantee limitations;

b. the improvement in LTV's financial and condition; and

c. LTV's demonstrated willingness to fund employee retirement plans.

Under the circumstances presented in this case, restoration is necessary to avoid abuse of the pension termination insurance program.

The group did not decide to include the Republic Retirement Plan (Republic Salaried Plan) at this time since PBGC expects to recover 100 percent of the plan asset insufficiency for this plan.

The minutes of the IOD/OGC SEPPAA Trusteeship Working Group's meeting of Thursday, August 6, 1987, and continued on Monday, August 10, 1987, are attached for your review.

Attachment

cc: IOD/OGC SEPPAA Trusteeship Working Group

[The attachment follows.]

IOD/OGC SEPPAA TRUSTEESHIP WORKING GROUP MINUTES OF THURSDAY, AUGUST 6, 1987

Attendees:

Angie Arnett, OGC
Mark Blank, OGC
Ray Collins, IOSD
Valerie Dinkins, OGC
Robert Joy, IOSD
Robert Klein, CPD
Al Rettig, ASD
Marvin Rosenblum, CPD
Alta Underwood, CPD

The meeting of the IOD/OGC SEPPAA Trusteeship Working Group was commenced at 10:00 A.M. to consider the restoration of the LTV Steel Company Pension Plans.

Additional attendees:

Gary Ford, OGC
Bill Beyer, OGC
Carol Flowe, OGC
Dave Gustafson, CPRD
Dave Gill, CPD
Lonie Hassel, OGC
Scot McCulloch, OGC
Eugene Weinzweig, CPD
Tom Bleakney, M&R
Robert Dezube, M&R

Background

The PBGC has involuntarily terminated the following pension plans sponsored by the LTV Steel Company, Inc.:

a. Republic Retirement Plan (Republic Salaried Plan);

b. Jones & Laughlin Retirement Plan (J&L Salaried Plan);

c. Jones & Laughlin Pension Plan (J&H Hourly Plan); and

d. Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Republic Hourly Plan).

At its meeting of September 16, 1986, the IOD/OGC SEPPAA Trusteeship Working Group (Group) recom-

mended that the Republic Salaried Plan be involuntarily terminated pursuant to the provision of section 4042 of ERISA that requires PBGC to institute proceedings to terminate a plan which does not have assets to pay benefits that are currently due. The date of termination was September 30, 1986.

At its meeting of January 5, 1987, the Group recommended that the J&L Salaried Plan, J&L Hourly Plan and the Republic Hourly Plan (Plans) be involuntarily terminated due to the Plans' failure to meet minimum funding standards and to avoid unreasonable deterioration of the Plans' financial condition. LTV had asserted that "because LTV is in reorganization under Chapter 11 of the Bankruptcy Code, LTV can not and will not make contributions to the Plans to eliminate the accumulated funding deficiencies . . . and is not likely to have the ability, to fund the Plans for future years." Additionally, financial analysis presented to the Group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding standards. The date of termination of the Plans was January 13, 1987.

Discussion

IOD requested that the Group make a recommendation on whether PBGC should restore the LTV Steel plans pursuant to section 4047 of ERISA.

Ray Collins set forth the agenda of the meeting:

1. Review the current facts;
2. Make a recommendation to the Director of IOD and the General Counsel concerning the restoration of the plans.

Subsequent to the termination of the Plans, LTV and the United Steelworkers of America (USWA) entered into a collective bargaining agreement which, among other

things, establishes new employee benefit arrangements (follow-on plans). LTV will also establish follow-on plans for salaried employees. On July 16, 1987, the Bankruptcy Court approved the collective bargaining agreement and the new employee benefit arrangements for salaried employees. The follow-on plans, together with the guaranteed benefits paid by the PBGC, will provide substantially the same benefits as the terminated LTV Steel plans. PBGC opposed approval of the follow-on plans in bankruptcy court because they evade the asset allocation and employer liability rules and essentially continue the terminated plans by providing substantially the same benefits and by paying amounts in excess of PBGC's guarantee limitations. (See attached affidavits of Kathleen Utgoff and C. David Gustafson submitted with PBGC's opposition to LTV's application for bankruptcy court approval of the follow-on plans.) Consequently, the adoption of the follow-on plans is a violation of Title IV and an abuse of the termination insurance program.

The Group discussed the purposes of Title IV of ERISA, PBGC's duties and obligations under Title IV and SEPPAA's Declaration of Policy.

Ray Collins stated that it appears that LTV's financial situation has improved significantly since the Plans were discussed at the Group's earlier meetings. At that time, LTV stated that it could not and would not make contributions to the Plans, and financial analysis based on LTV's projections indicated that LTV would not be able to fund the Plans to meet the minimum funding standards. Recently, LTV had agreed to make contributions to the follow-on plans. In addition, information submitted by LTV to the general unsecured creditors committee indicates that LTV has substantially exceeded its business projections of operating income.

Robert Joy summarized the Group's previous meetings on the termination of the LTV Steel plans, providing an

overview of the Group's actions and recommendations at each meeting.

OGC advised that section 4047 provides that PBGC may restore a terminated plan to the employer or plan administrator when it determines that restoration is appropriate and consistent with PBGC's duties under Title IV. The legislative history of section 4047 indicates that restoration is available to PBGC in circumstances it deems appropriate, including those where the circumstances which made termination appropriate have changed or where there has been an abuse of the termination insurance program. OGC advised that PBGC has discussed section 4047 in published opinion letters concerning attempts by companies to establish abusive follow-on plans.

CPRD provided an analysis of the LTV follow-on plans. Based on information LTV supplied in its application for Bankruptcy Court approval of the follow-on plans (copy attached), the follow-on plans, together with the guaranteed benefits paid by PBGC under the terminated LTV Steel plans, provide substantially the same benefits as the terminated plans and restore amounts in excess of PBGC's guarantee limitations. On average, benefits paid under the follow-on plans, plus benefits paid by the PBGC under the terminated plans, will equal over 90 per cent of the benefits payable under the plans if they had not terminated. LTV has estimated the cost of the follow-on union plans to be $70.8 million annually. The estimated cost of the follow-on plans for salaried employees would be approximately 20 to 25 per cent of the cost of the follow-on plans for union employees. The actuaries stated that these estimates are based on incomplete information supplied by LTV with respect to assumptions and underlying facts (e.g. participant data, planned shutdowns). The actuaries provided estimates of what the minimum funding costs would be if the LTV Steel plans were restored with and without contribution waivers from IRS.

The meeting was recessed at 11:45 AM and resumed at 1:30 PM.

The Group reviewed the attached trial transcript of the July 16, 1987, Bankruptcy Court hearing on LTV's application for approval of the follow-on plans, including the statements of an officer of LTV Steel regarding future shutdowns of LTV Steel facilities.

The Group discussed the restoration of the Republic Salaried Plan. That plan was terminated under the provision of section 4042 which requires termination by PBGC. The Group was informed that the contribution required to meet the minimum funding standard is less than the total annual benefit payments from the Republic Salaried Plan. PBGC expects to recover the entire amount of the plan assets insufficiency arising as a result of terminaton of the Republic Salaried Plan. The group decided to defer further discussion of the Republic Salaried Plan.

The meeting was adjourned until Monday, August 10, 1987, at 10:00 AM.

The meeting of the IOD/OGC SEPPAA Trusteeship Working Group concerning the restoration of the LTV Steel pension plans was resumed at 10:00 AM, August 10, 1987. The following members were present.

Angie Arnett, OGC	Valeria Dinkins, OGC
Al Rettig, ASD	Mark Blank, OGC
Robert Joy, IOSD	Marvin Rosenblum, CPD
Ray Collins, IOSD	Robert Klein, CPD
Alta Underwood, CPD	

Additional Attendees:

Bill Beyer, OGC	Scot McCulloch, OGC
Gene Kalwarski, M&R	Eugene Weinzweig, CPD
Robert Dezube, M&R	Ron Gebhardtsbauer, ASD

Representatives from M&R provided additional information concerning the costs of the follow-on plans and the terminated plans. LTV estimates the total annual cost of the follow-on plans for the first few years of operation to be $90.8 million. M&R advised that, based on a USWA newsletter, LTV is projected to contribute an additional $90 million to separate profit sharing plan for the benefit of USWA employees.

The M&R actuaries revised the estimates of minimum funding contributions required upon restoration that they provided at the August 6, 1987, meeting. Contributions owed to the two hourly plans for the 1986 plan year are estimated to total $160 million and the estimated contribution owed to the J&L Salaried Plan is $25 million, resulting in a total of $185 million. If waivers were obtained for the 1984 and 1985 plan years, the total annual contribution in 1987 is estimated to be between $195 and $200 million for the two hourly plans and $30 and $35 million for the J&L Salaried Plan.

CPD presented a financial analysis of LTV based on information supplied to the general unsecured creditors committee. The analysis indicated that The LTV Corporation and the members of its controlled group will generate more than enough cash in the immediate future to support the Plans if restored. The analysis also indicates that LTV Steel alone would be able to fund restored plans in the near future; however, PBGC does not have sufficient data to predict LTV Steel's future cash flow with any certainty.

A motion was made and seconded to recommend restoration of the Plans to the employer or plan administrator. The motion was based on (a) LTV's establishment of abusive follow-on plans which, together with the PBGC's guarantee, provide substantially the same benefits as the terminated plans and restore amounts in excess of PBGC's guarantee limitations; (b) the improvement in LTV's

financial condition; and (c) LTV's demonstrated willingness to fund employee retirement plans. The Group decided that under the circumstances presented in this case, restoration is necessary to avoid abuse of the pension termination insurance program. The vote in favor of the motion was unanimous.

The Group decided not to include the Republic Salaried Plan in its recommendation at this time since PBGC expects to recover 100 per cent of the plan asset insufficiency for that plan.

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Aug. 13, 1987

EXECUTIVE SUMMARY

To: Kathleen P. Utgoff
Executive Director

FROM: /s/ Bill DeHarde
William DeHarde, Director
Insurance Operations Department

/s/ Gary Ford
Gary M. Ford
General Counsel

SUBJECT: SEPPAA Working Group recommendation to restore terminated LTV pension plans.

ACTION REQUIRED: Approval of the recommendation

BACKGROUND: Attached is a recommendation of the SEPPAA Working Group to restore three terminated pension plans sponsored by the LTV Steel Company, Inc. Also attached is a copy of the record on which their recommendation is based.

The Group met on August 6th and 10th and reviewed the facts surrounding their initial recommendation to terminate four plans sponsored by LTV: Republic Retirement Plan (Republic Salaried Plan); Jones & Laughlin Retirement Plan (J&L Salaried Plan); Jones & Laughlin Pension Plan (J&L Hourly Plan); and, Pension Plan of Republic Steel Corporation (Republic Hourly Plan).

After a thorough review of the facts leading to and following the termination of the LTV plans, including the abuse of the Title IV insurance program resulting from LTV's establishment of new employee benefit arrange-

ments (follow-on plans), which together with the PBGC's guarantee provide substantially the same benefits as the terminated LTV pension plans and restore amounts in excess of PBGC's guarantee limitation, the improvement in LTV's financial condition, and LTV's demonstrated willingness to fund employee retirement plans, the Group unanimously recommended restoration of the two hourly plans and the J&L salaried plan to the employer or plan administrator pursuant to section 4047 of ERISA.

The Group decided not to recommend restoration of the Republic salaried plan at this time because facts currently available indicate that PBGC will recover 100 percent of the plan asset insufficiency for that plan.

We endorse the Group's recommendation and request your concurrence.

Attachments

[The attachments are reprinted at JA 319, 311.]

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Office of the Executive Director

Aug. 31, 1987

Mr. Raymond A. Hay
Chairman of the Board and
Chief Executive Officer
The LTV Corporation
2001 Ross Avenue
Dallas, Texas 75265-5003

Dear Ray:

I read with considerable alarm certain statements attributed to Mr. Julian Scheer, LTV's Senior Vice President of Corporate Affairs in The Washington Post, Saturday, August 29, 1987.

As you should know, one of several options under review at the Agency is "Restoration" of the plans pursuant to Section 4047 of the Employee Retirement Income Security Act. To suggest that enforcement of the law (if we select this option) is, "retaliation of the worst kind. Retaliation against the most innocent and helpless players: the retirees themselves," as stated by Mr. Scheer is blatantly irresponsible.

Restoration of the plans would provide 100% of the benefits LTV promised but failed to fund under the "old" plans. This is obviously greater than the 92.25% maximum you are paying under your "new" plans. Therefore, retirees would *benefit* from a restoration.

Since this is so clear, I can only conclude that Mr. Scheer was attempting to terrorize retirees into opposing a lawful action which would benefit them.

Fortunately the next paragraph correctly quoted a source who indicated that, "There isn't a scenario under which people won't get their money." "There is *no danger* of benefits ceasing." (emphasis added). This is true.

Ray, the retirees were held hostage for too long. Although it was within the power of LTV and the United Steelworkers of America to reach agreement on "hardship" payments throughout the bargaining period, you only provided them once. To now make a further threat of hardship is unconscionable. And, it is simply untrue.

While we will no doubt continue to disagree on many issues, I'm sure that we do agree that the workers have paid a dear enough price. They should not be punished further for LTV's inability to fund its pension promises.

Sincerely,

/s/ Royal
ROYAL S. DELLINGER
Principal Deputy Executive Director
and Chief Negotiator

RSD:jr

Enclosure

cc: Mr. Julian Scheer
Mr. Lynn Williams

[The enclosure follows.]

D8 Saturday, August 29, 1987 The Washington Post

LTV MAY FACE LIABILITY ON PENSIONS

Plan Is Among Options Weighed by PBGC for $2.3 Billion in Unfunded Benefits

By Cindy Skrzycki
Washington Post Staff Writer

The Pension Benefit Guaranty Corp., which insures the pension benefits of some 40 million workers may force the bankrupt LTV Corp. to accept responsibility for $2.3 billion in unfunded pension liabilities.

The move, one of several options that sources said the PBGC is considering on LTV, would be unprecedented in the agency's 13-year history. Although the PBGC has had similar disputes with other companies, it has never resorted to returning to an employer responsibility for pension benefits that were turned over to the government.

Sources said the agency, which terminated four of LTV's pension plans after the company filed for bankruptcy last July, has not made a decision on how to settle its differences with LTV. LTV is the nation's second-largest steel company.

The agency maintains that new pension arrangements agreed to by the company and the United Steel Workers union violate the Employe Retirement Income Security Act (ERISA) because they would restore most supplemental benefits to early retirees and provide a plan for active workers that essentially adds up to the plans that were abandoned by the company.

The bankruptcy court handing the LTV case approved the new pension arrangements over the objections of the agency.

"Such arrangements, regardless of what they are called, effectively continue the terminated plan, but the PBGC

would be manipulated into picking up much of the cost. This is an abuse of the insurance system and can't be ignored," the agency said in a position paper on the LTV case.

The agency also believes it has authority under ERISA to "restore" a plan it has terminated to its former status.

Legal experts said the effect of turning back the plan to the company would be unclear because of the effect of bankruptcy laws on a company's pension obligations.

However, the agreement LTV signed with the steelworkers provides that a PBGC turnback of the plans to the company would nullify the current agreement.

"There is no case where this has ever occurred. You are in the twilight zone," said one pension expert.

LTV said that if the agency followed that course it would be "retaliation of the worst kind. Retaliation against the most innocent and helpless players: the retirees themselves," said Julian Scheer, senior vice president of corporate affairs.

Scheer added that the company would "vigorously oppose" such an action by the agency. "The PBGC took the plans because they lacked the necessary long-term resources to cover funding requirements and LTV lacked long-term resources to fund them. That has not changed," said Scheer.

Whatever course the government takes, it is unlikely that retirees would be harmed since there are $1.5 billion in assets in the plans. "There isn't a scenario under which people won't get their money," a source said. "There is no danger of benefits ceasing."

The agency, which is fighting approval granted by the bankruptcy court of LTV's new collective bargaining agreement and pension plan, could also simply reduce the

monthly benefits it is paying to early retirees by the amount they are receiving under the new contract.

It also favors a different kind of trust arrangement or separate plan to assure the pension rights of current workers.

Overall, the agency, which already has a $4 billion deficit, fears that other companies will be encouraged to follow LTV's lead in shedding old, more expensive pension obligations for new programs that are riskier for employes and not insured by the government. As LTV's largest creditor, the PBGC also is concerned that payments under the new contract will lessen its claims on the company.

"The insurance system shouldn't be used to shore up corporate profits or enhance a company's competitive position," said PBGC Executive Director Kathleen Utgoff. "It's for retirees."

The agency is responsible for the pension benefits of 108,000 LTV workers, 85 percent of whom are receiving full benefits. The new pension arrangements between LTV and the steelworkers union restores about 92 percent of the pension supplements lost by some 8,000 early retirees.

LTV—which has since turned the corner to profitability after filing for bankruptcy with $6.5 billion in liabilities, and which may emerge as one of the nation's stronger steel companies—will pay about $90 million for all of its new plans, compared with its former $225 million average annual cost for its defined benefit plans.

About 80 percent of the agency's claims now relate to steel company bankruptcies, the largest of those being LTV and Wheeling-Pittsburgh Steel Corp.

Although large steel producers have been lobbying the government for help in futher restructuring the industry

and eliminating excess steelmaking capacity, it opposes allowing companies to gain a competitive advantage through parking pension liabilities with the PBGC. Companies such as Inland Steel and the steel subsidy of USX Corp. have fully funded plans.

[LTV Logo]

The LTV Corporation

Chairman of the Board
and Chief Executive Officer

September 10, 1987

Mr. Royal S. Dellinger
Deputy Executive Director
and Chief Negotiator
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006

Dear Royal:

I would like to set the record straight and correct the misleading and inaccurate statements in your letter of August 31, and particularly I would take this opportunity to reaffirm on behalf of LTV the assertions made in the *Washington Post* article.

The PBGC has repeatedly stated that the options it has under review are: (1) "restoration" of the plans and (2) a reduction in the amount of checks being dispersed to retirees by the amount of the "make-up" plan. Yet nowhere in your letter is the letter option mentioned. As you well know, retiree groups are aware of these statements. If the PBGC is no longer considering this option, the Agency should say so. This would do far more to give the retirees peace of mind than the self-serving statements contained in the last two paragraphs of your letter.

Your statements with respect to restoration of the plans are incomplete and misleading. The PBGC terminated the plans in question because, to use the agency's own statements, "the minimum funding standards had not

and would not be met and . . . termination was necessary to avoid any unreasonable deterioration of the financial condition of the plans or any unreasonable increase in the liability of the PBGC's insurance fund." Absolutely nothing has occurred to alter this conclusion. If the plans were to be restored, the ultimate reorganization of the company would be jeopardized and the interests of retirees, employees, creditors and shareholders would be adversely affected. Further, as you know, we do not believe that the PBGC has the legal authority to take such a drastic and unreasonable step and we will legally resist such an attempt to the utmost of our resources. The uncertainty created by the litigation alone will create stress and upset among not only the current retirees but all active workers and creditors.

Royal, the issues you have raised, if not resolved by a plan of reorganization, will ultimately be determined by the courts. In the meantime we request once again that you put on your creditor's hat and come to the bargaining table to negotiate a resolution of your claims. By continuing to refuse to do so you are unreasonably delaying the day when a plan will be confirmed, to the detriment not only of your premium payers but also to the detriment of all the company's creditors, for you well know that as the largest creditor there can be no plan of reorganization without your participation.

Sincerely,

/s/ Ray
RAYMOND A. HAY

cc: Julian Scheer
Lynn Williams

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

Office of the Executive Director

September 14, 1987

Mr. Raymond A. Hay
Chairman of the Board and
Chief Executive Officer
The LTV Corporation
2001 Ross Avenue
Dallas, Texas 75265-5003

Dear Ray:

You obviously misunderstood my letter of August 31. I wrote to bring to your attention, an irresponsible statement by Julian. My letter did not purport to describe the options available to the Agency as suggested by your letter. For the record, there are *four* (4) options which the Agency has publicly acknowledged are under review. They are as follows:

(1) restoration under Section 4047 of ERISA;

(2) equitable adjustment as discussed in item two (2) of your letter;

(3) continued "follow-on" plan litigation presently pending in court; and,

(4) to do nothing.

The article in question specifically described "*one of several options*" (emphasis added). It, like my letter to you, did not attempt to articulate the alternatives available other than restoration.

Each option is still under review. Therefore, it would be inappropriate to dismiss any one of them at this time.

Ray, you also dismiss as "self-serving" the last two paragraphs of my letter. This seems odd. It is an indisputable fact that LTV failed to meet its obligations to fund its pension promises. This has created a hardship on its retirees and active workers that you now expect PBGC to remedy through the use of your competitors and other responsible plan sponsors premiums, to fund your $2.3 billion deficiency. You disregard the risk that this bailout places on the pension insurance system. And, you incorrectly blame PBGC for the hardships imposed on your present and former employees.

Finally Ray, I remind you that the "Agency's own statements" to which you refer were in response to LTV's refusal to continue funding its promises. I refer specifically to Frank Cummings letter of December 16, 1986 in which he stated on behalf of LTV, that the company "cannot and will not make contributions to the Plans."

Sincerely,

/s/ Royal
ROYAL S. DELLINGER
Principal Deputy Executive
Director and Chief
Negotiator

RSD:jr

Enclosure: "PBGC wants out of LTV pension role," *The Evening Independent*, (Saturday, August 29, 1987).

cc: Mr. Julian Scheer
Mr. Lynn Williams

[The enclosure follows.]

THE EVENING INDEPENDENT SATURDAY, AUGUST 29, 1987

PBGC WANTS OUT OF LTV PENSION ROLE

By ULYSSES TORASSA
inde Washington Bureau

WASHINGTON—The head of the federal agency that took $2.3 billion in pension funds off the hands of LTV Steel is sending out strong signals the plans may be returned to the troubled steelmaker.

Although no final decision has been made, Kathleen Utgoff, executive director of the Pension Benefit Guaranty Corp., Friday indicated that move heads the list of options being studied by the agency.

During an interview in her office, Utgoff discussed why returning the plant to LTV is attractive to the PBGC. She also cited the disadvantages of three other options the agency is weighing.

The PBGC chief said she wants to make a final decision "as soon as possible" but would offer no specifics on when an announcement could be expected.

While acknowledging LTV would likely take court action to block such a move, she said the plan to return pension control to the steelmaker is attractive to the PBGC for several reasons:

• Retirees would continue to receive the same benefits they now are getting, as well as the almost complete restoration of the $400 a month supplemental benefits to early retirees included in a new LTV-United Steel Workers agreement.

• Present workers, whose new pension plan under the labor contract is not insured by the PBGC, would find their retirement fund once again fully insured.

• The action would put a stop to what Utgoff called "corporate welfare" for LTV by preventing the firm from using the PBGC as a way of shedding expensive pension liabilities.

"A small federal pension insurance agency shouldn't be involved in restructuring a major industry," Utgoff said during Friday's interview. "We're not an industrial policy agency. We should be a safety net for workers and what we've become is a redistributor of corporate wealth and a provider of corporate subsidies . . . corporate welfare."

LTV creditors have complained bitterly the steelmaker has gained an unfair advantage by "dumping" its pension liabilities. The PBGC is concerned LTV's example will encourage other companies with underfunded pensions to slough them off on the agency, which already is reeling from a $4 billion deficit brought on largely by the steel industry.

The PBGC is worried that if LTV is allowed to shed its obligations and still keep labor peace by offering the same benefits to present workers, other companies will follow suit, leaving the deficit-ridden agency holding the bag.

Asked about the possibility the PBGC might return the plans, David Carroll, an LTV Steel spokesman in Cleveland, said, "We feel that there is no legal or moral basis for them (the PBGC) to take that kind of action. We would vigorously oppose any such move and we would expect to be successful."

Carroll said the PBGC, which took the lead in having the plans terminated, did so because LTV is trying to reorganize under bankruptcy laws and was no longer able to contribute to the funds. He said despite two subsequent profitable quarters, the steelmaker remains in financial trouble.

If the PBGC were to return the pension funds, he added, "It would definitely be a negative factor in our ability to reorganize within the time frames we're seeking."

A spokesman for the United Steel Workers of America in Pittsburgh said the union is not yet prepared to take a position on the possible return of the pension funds.

Besides returning the funds, another option the PBGC has is cutting benefits to retirees by the same amount they are receiving from LTV under the new contract. Employees who retired early were promised an average of $400 per month to make up for the lower regular pension checks, but such supplements were not insured by the PBGC.

Under that option, the agency also would cut future retirees' benefits by amounts provided by the new pension plan included in the contract, Utgoff said.

She said that option is unattractive, however, because it most hurts retirees, the people her agency is supposed to be protecting.

Two other options are to do nothing, or to wait out the course of litigation the agency has started to challenge the new contract. Utgoff said she is concerned the "protracted" nature of the legal proceedings leaves LTV retirees hanging in the balance and uncertain, something she wants to avoid.

Besides, she said, "what do you do about precedents for other companies in the interim?" What LTV has done with its new labor contract "makes pension plan termination virtually irresistible," she added.

MEMORANDUM

To: SEPPAA Committee
Fr: Bob Klein /s/ RK 9/15/87
Re: LTV Restoration—Summary financial analysis

We are limiting our analysis to a review of management's numbers; we are not attempting to project economic or other factors that will affect LTV in the future. The analysis is summarized below. It has been concurred in by Mike Lederman of Goldman, Sachs.

A. *Annual cash flow*

1. Cost of 2 union plans is $160M if no waivers granted, or $195M if 1984-85 waivers granted. Adding 1986 waiver probably boosts future cost (in 1988 and thereafter) to $215M. Adding 20% for salaried plans results in $260M total cost prospectively with 1984-86 waivers granted.

2. Cash cost of supplemental benefits estimated by company at $70M for hourly employees. Using company assumptions, comparable cost for supplemental benefits would be $20M. We believe these estimates are low, but do not have a defined range for our estimate of the costs.

3. The incremental effect of full restoration based on company cost estimates is therefore $170M. We believe that the effect will be less, not only because of our concerns over the actuarial methods used to develop the company estimates but also because of the effects of a profit-sharing plan and the cost of shutdowns, which would be shifted from the company to the pension plans if the plans are restored.

4. The new collective bargaining agreement has been estimated by management to include savings from job reductions of $50M. These savings should be realized whether or not the pension benefits paid to the workforce are through restoration or through the new arrange-

ments. The net effect on the company after the job reductions is therefore somewhat less than $120M. This assumes that in the event of restoration, the collective bargaining agreement is voided by one of the parties, but that further bargaining preserves the job reductions.

5. The 1987-88 LTV Operating Plan estimated net income from LTV Steel of $239M and $260M for 1987 and 1988, and net cash flow of $270M and $265M in those years. Net income from LTV Aerospace & Defense was estimated to be $159M and $161M for 1987 and 1988, and net cash flow was estimated to be $6M and $80M in those years. The contribution of LTV Energy Products was estimated to be nominal. Hourly current service pension cost of $21 million was accrued in developing the above estimates, as was a profit-sharing payment of $31 million in 1988.

6. According to the July 29 report to the Creditors' Committee, actual operating income vs. the plan for January-May 1987 was as follows: ($Mil.)

	Actual	Plan	Variance	Annual Plan
LTV Steel	163.7	118.8	44.9	267.9
LTV A&D	62.8	65.2	(2.4)	159.8
LTV Energy Products	1.6	(1.4)	3.0	(1.6)
Total	228.1	182.6	45.5	426.1
Annualized total	532.3	426.1	106.2	

The Plan recognized cash cost for pensions of $47M (34M hourly, 13M salaried). It is not evident at what rate pension costs have been accrued in development of the actual operating results. If the accrual rate is similar to the cash cost, the annualized operating income for 1987 without the pension accrual would be $580M. These results do not include the projected $50M annual benefits from job reductions. If the job reduction benefits are considered, the annualized 1987 results would be $630M on a pro forma basis without pensions.

7. An average of $45M was provided for in the 1987-88 plan for interest expense. Interest is being accrued

on those debts that are believed to be secured. After allowance for interest expense, annualized net income for 1987 on a pro forma basis without pensions would be $585M.

8. We understand that a profit-sharing formula has been agreed to that would pay 10% of the first $100M of profits and 20% of the excess with an offset for retention of retiree health benefits. I understand that payments under the profit sharing plan are expected to be either in cash or in stock that would have a put option against LTV in the event that there were profits in subsequent years following the year that the stock was issued.

Based on LTV's own cash flow projections, it appears that the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation. Thus a plausible case can be made from LTV's own numbers that the company has the wherewithal to support the ongoing pension plans.

B. *Claims resolution and balance sheet considerations*

Total prepetition claims are roughly $6.2B, of which LTV Steel's portion is roughly $4.5B. The claims were $6.7B in December 1986, broken down roughly as follows: ($Mil.)

Bank notes	644
L-T debt, fully secured	250
L-T debt, partially secured	411
L-T debt, unsecured	1,581
Accounts payable	474
Pensions	2,245
Reserve for exec. contracts	600
Other	747

There was $432M of cash on hand in May*. Based on Goldman, Sachs' preliminary net worth estimates, we be-

lieve that a priority claim for $1.2B for employer liability could be sustained. Additional priority claims of about $151M for DUEC exist if the plans are terminated ($211M filed less $60M needed to amortize prior waivers). In addition, non-priority claims for 75% of PAI net of the priority amount ($750M less offsets for DUEC collectibility) exist for employer liability. These claims would substantially dilute the other unsecured creditors. If the plans are restored, all of the employer liability claims would be removed, and most of the priority DUEC would be removed as well if minimum funding waivers were granted for 1984-86.

An analysis of the effect of a withdrawal of employer liability claims on the other creditors cannot be done without knowing how the Aerospace & Defense company is to be treated. Nonetheless, the general effect is that if the plans are restored and the claims withdrawn, the other creditors would wind up with a larger share of a less profitable company than if the plans are terminated.

* Cash on hand is believed to be in excess of $680M at the end of July 1987 after servicing bank debt and paying $200M principal on secured letters of credit.

To: William DeHarde, Director
Insurance Operations Department

Gary Ford, General Counsel
Office of the General Counsel

From: Bob Klein /s/ RK 9/16/87

Re: LTV Restoration—Revised summary financial analysis

Attached is the summary financial analysis that was the basis for my presentation to the IOD/OGC SEPPAA Trusteeship Working Group on August 10, 1987. The summary has been revised as a result of comments made by members of the Working Group during the meeting and by representatives of OGC since that time. The conclusions given to the Working Group at that meeting and reflected, in part, in the summary have not changed as a result of any of the revisions.

Attachment

[The attachment is reprinted at JA 343.]

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Office of the Executive Director

September 18, 1987

Mr. Raymond A. Hay
Chairman of the Board and
Chief Executive Officer
The LTV Corporation
2001 Ross Avenue
Dallas, Texas 75265-5003

Dear Ray:

Royal Dellinger has told me of his telephone conversation with you, in which you asked whether it was true that a decision had been made to restore the terminated pension plans. As Royal told you, we are still considering the four options described in his recent correspondence to you, and I have not yet made a decision.

As you know, we have been discussing this matter with you over the past several months. After the press reported in June that we might restore the plans, we met with you on July 9, 10 and 13, and both LTV and USWA officials were given an opportunity to present us with any relevant information. The discussion continued after that time in a series of letters between you and Royal, and Jim Powers and Royal.

I understand that you suggested to Royal that you may now wish to have an additional meeting. We would, of course, be happy to consider any additional information you might wish to supply. Accordingly, while Royal's schedule is crowded next week, he would be happy to come to Dallas this evening to meet with you

this weekend and review any new information you wish to convey. Please call me as soon as possible if you believe that this would be useful.

Sincerely,

/s/ Kathy
KATHLEEN P. UTGOFF
Executive Director

KPU:jr

[Page from undated draft of the Executive Summary reprinted at JA 352, inadvertently included in assembly of the Administrative Record.]

—2—

3. Form 10-K for LTV Aerospace and Defense Company for the fiscal year ended December 31, 1986.

4. Form 10-Q for The LTV Corporation for the quarter ended March 31, 1987.

5. Form 10-Q for LTV Steel Company, Inc. for the quarter ended March 31, 1987.

6. Form 10-Q for LTV Aerospace and Defense Company for the quarter ended March 31, 1987.

7. Form 10-Q for The LTV Corporation for the quarter ended June 30, 1987.

8. Form 10-Q for LTV Steel Company, Inc. for the quarter ended June 30, 1987.

9. Form 10-Q for LTV Aerospace and Defense Company for the quarter ended June 30, 1987.

10. Outline summary produced by LTV of follow-on pension arrangements for salaried employees.

11. Transcript of hearing in *USWA* v. *LTV Steel Company, Inc.*, Adversary Proceeding No. 87-5016A, held June 23, 1987, pp. 96-155 (Testimony of Thomas Levy).

12. Data sheets setting forth an analysis of plan asset solvency under different scenarios following restoration of the LTV Steel pension plans.

13. Minutes of the Board of Directors meeting held on September 17, 1987.

Finally, we have been advised that at the Creditors' Committee meeting held during the week ended September 12, 1987, representatives of LTV announced that the company would reveal its latest business plan early in October. During their deliberations on this matter, the mem-

bers of the working group indicated that they would have recommended restoration in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed. Moreover, the most current financial reports do not reflect a change in LTV's improved financial condition. Thus, we are confident that the substance of this proposed business plan would not alter the Group's recommendation. Accordingly, we reiterate our previous endorsement of the Group's recommendation and request your concurrence.

Attachments

[PBGC Logo] Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington,
D.C. 20006-1806

Sep. 18, 1987

EXECUTIVE SUMMARY

To: Kathleen P. Utgoff
Executive Director

THROUGH: Royal S. Dellinger
Deputy Executive Director

Joseph A. Vasquez, Jr.
Deputy Executive Director

FROM: William DeHarde, Director
Insurance Operations Department

Gary M. Ford
General Counsel

SUBJECT: SEPPAA Working Group recommendation to restore terminated LTV pension plans.

ACTION REQUIRED: Approval of the recommendation

BACKGROUND: By memorandum dated August 13, 1987, we forwarded for your consideration a copy of the minutes of the SEPPAA Working Group setting forth its recommendation to restore three terminated pension plans sponsored by LTV Steel Company, Inc. We understand that you have not yet acted on the Group's recommendation.

After August 13, the minutes that we forwarded were revised to reflect comments of individuals who were on vacation when the original minutes were prepared. A copy of the revised minutes is attached. The Group's recommendation has not changed.

We are also adding information to the record before you (all of which you have reviewed previously). As you know, at the request of a number of members of Congress following a press report indicating that PBGC was considering restoration of the LTV plans, you and other PBGC officials met with LTV and USWA officials on July 9 (together with members of Congress), 10 and 13 regarding LTV's follow-on plans, possible plan restoration, and other issues. We have attached for your review correspondence leading to and following those meetings.

We have also attached the following information pertinent to your decision in this matter, which you have reviewed previously:

1. Form 10-K for The LTV Corporation for the fiscal year ended December 31, 1986.

2. Form 10-K for LTV Steel Company, Inc. for the fiscal year ended December 31, 1986.

3. Form 10-K for LTV Aerospace and Defense Company for the fiscal year ended December 31, 1986.

4. Form 10-Q for The LTV Corporation for the quarter ended March 31, 1987.

5. Form 10-Q for LTV Steel Company, Inc. for the quarter ended March 31, 1987.

6. Form 10-Q for LTV Aerospace and Defense Company for the quarter ended March 31, 1987.

7. Form 10-Q for The LTV Corporation for the quarter ended June 30, 1987.

8. Form 10-Q for LTV Steel Company, Inc. for the quarter ended June 30, 1987.

9. Form 10-Q for LTV Aerospace and Defense Company for the quarter ended June 30, 1987.

10. Outline summary produced by LTV of follow-on pension arrangements for salaried employees.

11. Transcript of hearing in *USWA v. LTV Steel Company, Inc.*, Adversary Proceeding No. 87-5016A,

held June 23, 1987, pp. 95-158 (Testimony of Thomas Levy).

12. A data sheet setting forth the assets, liabilities, and annual minimum funding contributions for each of the three LTV Steel pension plans for which restoration has been recommended.

Finally, we have been advised that at the Creditors' Committee meeting held during the week ended September 12, 1987, representatives of LTV announced that the company would reveal its latest business plan early in October. LTV's improved financial circumstances were not the primary basis for the recommendation that the plans be restored. Nevertheless, we note that the most current financial reports reflect continuing improvement in LTV's financial condition. Thus, we reiterate our previous endorsement of the Group's recommendation and request your concurrence.

We have attached a notice of restoration for your signature, should you concur in our recommendation.

Attachments

[Certain of the attachments referred to in this Executive Summary are reprinted at JA 311 (revised minutes), JA 147-49, 262-74, 330-42 (correspondence), JA 132-36, 143-46 (Forms 10-K and 10-Q) (excerpts from certain of these only), and JA 223 (salaried pension program information). The remaining attachments were omitted in printing.]

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington,
D.C. 20006-1806

MEMORANDUM

To:	Kathleen P. Utgoff Executive Director
From:	Robert Klein /s/ RK 9/21/87 Financial Analyst
Subject:	Summary Financial Analysis Clarification

This is in response to your request for an explanation of the source of the claim amounts in my memorandum to the SEPPAA Committee dated September 15, 1987. The total amount of "pre-petition" pension claims on page 3 of the memo is from the 1987-1988 Operating Plan of The LTV Corporation. The reference on page 4 to additional priority claims "if the plans are terminated" should say "if the plans remain terminated." The amounts and priorities of plan asset insufficiency and DUEC claims on page 4 of the memo are preliminary estimates provided by PBGC actuaries. I understand the actuaries' estimates are based on information provided by LTV.

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Sep. 21, 1987

MEMORANDUM

To: Kathleen P. Utgoff
Executive Director

FROM: Gary M. Ford
General Counsel

SUBJECT: Restoration Decision: LTV Pension Plans.

The documents listed below, which you have previously reviewed, are attached for inclusion in the administrative record on the issue of whether to restore the three LTV Steel Company, Inc. ("LTV Steel") pension plans terminated effective January 13, 1987.

1. January 12, 1987 Applications of PBGC for Decree of Pension Plan Termination for three LTV Steel plans, Memoranda of Points and Authorities in support thereof, Affidavits and Exhibits.
2. January 12, 1987 Consent Orders terminating the three LTV Steel plans.
3. July 8, 1987 Notice of Motion and Application for Authority to Make Pre-Petition Contributions in Accordance with the Employee Investment Program.
4. July 30, 1987 Order Authorizing Pre-Petition Contributions in Accordance with the Employee Investment Program.
5. July 30, 1987 Order Authorizing LTV Steel to Enter into Certain Agreements and Programs and to Make Certain Payments.
6. August 1987 Summary of Proposed Agreement between the United Steelworkers of America ("USWA") and LTV Steel Company, Inc., published by the USWA.

7. September 18, 1987 resolution of PBGC's Board of Directors.

Also attached is a memorandum of a meeting on September 19, 1987, among Royal Dellinger and Scot McCulloch of PBGC and Raymond Hay, James Powers, Julian Scheer and Lou Kaden representing LTV.

Attachments

[Certain of the attachments referred to in the memorandum are reprinted at JA 141 (one consent order), JA 275 (USWA Summary of Proposed Agreement), JA 364 (September 18, 1987 PBGC Board resolution), and JA 356 (memorandum of meeting on September 19, 1987). The remaining attachments were omitted in printing.]

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Office of the Executive Director

September 22, 1987

MEMORANDUM

To: Kathleen P. Utgoff

From: Royal S. Dellinger

Re: Additional Meeting With LTV

Gary Ford and I met today with the following LTV officials and lawyers: Jim Powers, Chief Financial Officer, Emmett Smith, General Counsel, Julien Scheer, Director of Corporate Affairs, Frank Cummings, Special ERISA Counsel, Lou Kaden, outside counsel. Jim Powers indicated that LTV was most concerned about the equitable adjustment option. He stated that that option would be harmful to retirees and the estate and could precipitate a strike. As to the restoration option, he stated that the economic effect would be unclear (that it is a "never-never land"), that it would give rise to time-consuming litigation, that it would cast doubt on the reorganization and that it would be hard on other creditors.

Gary pressed them for any specifics they could offer as to the effect of either option on interested parties. Frank Cummings indicated that if they were unable to obtain any waivers, they could owe as much as $300 million in past due contributions for the *four* plans of which PBGC is now trustee, if all four plans are restored. He stated that they would be hard-pressed to come up with collateral for waivers.

Lou Kaden suggested that we drop our appeal of the Bankruptcy Court's approval of the follow-on plans, take no administrative enforcement action, and file a law suit

against them seeking a declaration that the follow-on plans are illegal. They would agree in exchange to throw up no procedural roadblocks to a decision in the law suit. Gary said that he was concerned about the delay that would be involved in resolving yet another law suit, the propriety of asking the court for what is in essence an advisory opinion and the implication that the Agency is powerless to act administratively to correct an abuse that, under their proposal, could persist for months or years. We said we would consider the proposal and get back to them with a tentative response in 24 hours.

They repeated their request for 24 hours advance notice of any administrative action so that we can coordinate press materials and, if necessary, notify the stock exchange. I reiterated that we would give them as much advance notice as possible and that we would work hard to communicate to the workers in an unprovocative manner.

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Sep. 22, 1987

MEMORANDUM

To: William Deharde, Director
Insurance Operations Department

Gary M. Ford
General Counsel

FROM: Kathleen P. Utgoff
Executive Director

SUBJECT: Restoration of terminated LTV pension plans

I have reviewed the recommendation of the SEPPAA Working Group to restore three terminated pension plans sponsored by LTV Steel Company, Inc., the record on which its recommendation is based, the additional information you provided and your endorsement of the Working Group's recommendation. I concur in this recommendation and believe such a determination is not only appropriate in these circumstances but necessary to protect Title IV's insurance program and the 40 million workers who depend on it. I also note that restoration of the LTV Steel pension plans is entirely consistent with the resolution recently adopted by the Board of Directors.

Attached, for your processing, is an executed Notice of Restoration.

[The attachment is reprinted at Pet. App. 182a.]

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1806

Dec. 30, 1987

MEMORANDUM

To: Kathleen P. Utgoff
Executive Director

FROM: Gary M. Ford
General Counsel

SUBJECT: Restoration Decision: LTV Pension Plans.

As you will recall, the Board of Directors of the PBGC held a meeting by telephone on September 18, 1987, to discuss your request for policy guidance on the restoration of pension plans under Section 4047 of ERISA. As Secretary to the Board, I participated in the meeting, and immediately after the meeting, provided you with a full report on the discussion that took place and the resolution that was adopted, so that you could consider the Board's views in determining whether to restore the LTV pension plans. I then prepared minutes of the meeting which were circulated to all of the Board members for their approval.

The minutes of the September 18, 1987 Board meeting have now been approved by each of the Board members. Accordingly, I am forwarding copies to you with this memorandum, for inclusion in the administrative record of your determination to restore the LTV pension plans.

Attachments

[PBGC Resolution 88-1 follows. The Board minutes are reprinted at Pet. App. 180a.]

PENSION BENEFIT GUARANTY CORPORATION RESOLUTION 88-1

With the understanding that such resolution will not be adopted unless and until unanimously approved by all three Directors, I, in my capacity as one of the Directors of the Pension Benefit Guaranty Corporation, hereby vote to approve the adoption of the following resolution without a meeting of the Board:

RESOLVED that the attached minutes to the Board of Directors' Meeting of September 18, 1987, be adopted.

/s/ James A. Baker III
Secretary of the Treasury

Dec. 22, 1987

88-6244, 88-6246, 88-6252

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff-Appellant, Cross-Appellee,

DAVID H. MILLER and WILLIAM W. SHAFFER,
Intervenors-Appellants,

v.

THE LTV CORPORATION and LTV STEEL COMPANY, INC.,
Defendants-Appellees,

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, and CITIBANK, N.A.,
Intervenors-Appellees.

THE LTV BANK GROUP,
Intervenor-Appellee, Cross-Appellant.

Appeal from the United States District Court For the Southern District of New York

JOINT APPENDIX

JOINT APPENDIX TABLE OF CONTENTS
[Court of Appeals]

[Heading omitted in reprinting.]

INDEX TO EXHIBITS TO JOINT APPENDIX
[filed in the court of appeals]

[1] The documents separately bound in Volumes IA and IB of the Administrative Record are out of order because were initially sealed, out of a concern that they contained information that was, arguably, proprietary business information. With LTV's agreement, they were subsequently unsealed, but as a result, they remain separate from the documents to which they were originally attached.

VOLUME VII

No. 89-390

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,
v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Where the Pension Benefit Guaranty Corporation ("PBGC") is broadly authorized to restore terminated pension plans "in any such case in which [PBGC] determines such action to be appropriate and consistent with its duties under [ERISA]," 29 U.S.C. § 1347, may a reviewing court foreclose the agency from considering whether restoration is appropriate to remedy abuse of the federal pension insurance program?

2. May a reviewing court substitute its judgment for PBGC's as to the appropriate considerations for restoration on the basis of improved financial circumstances?

3. May a reviewing court vacate a restoration decision under 29 U.S.C. § 1347 because PBGC focused "inordinately" on ERISA and failed to defer to selected policies underlying the bankruptcy and labor laws?

4. When an agency undertakes informal adjudication under a statute that sets forth no procedural requirements for exercise of its authority, may a reviewing court substitute its judgment for the agency's as to the appropriate procedures to be followed?

LIST OF PARTIES

The caption contains the names of all the parties to the proceedings in the court of appeals. Petitioner, the Pension Benefit Guaranty Corporation, is a wholly-owned United States government corporation that has no subsidiaries or affiliates.

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 875 F.2d 1008, and is reprinted at pages 1a-27a of the Appendix to PBGC's petition for a writ of certiorari ("Pet. App.").[1] The judgment of the United States District Court for the Southern District of New York dated September 13, 1988, from which appeal was taken, and the district court's

[1] The Appendix to the petition was bound in a separate volume.

opinion of June 22, 1988, reported at 87 Bankr. 779, are reprinted at Pet. App. 132a and 28a-131a, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on May 12, 1989. Pet. App. 1a. On August 1, 1989, Justice Marshall granted an extension of time within which to file a petition for a writ of certiorari until and including September 10, 1989, which was a Sunday. PBGC timely filed its petition on September 11, 1989. This Court granted the writ on October 30, 1989.

STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, which are set forth at Pet. App. 133a-157a.[2]

STATEMENT OF THE CASE

Statutory Background

The Pension Benefit Guaranty Corporation is a wholly-owned United States government corporation, 29 U.S.C. § 1302, modeled after the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen). The Board of Directors of the PBGC consists of the Secretaries of Labor, Treasury and Commerce. 29 U.S.C. § 1302(d). The PBGC has independent litigating authority. 29 U.S.C. § 1302(b)(1).

[2] ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) ("SEPPAA"), and again in 1987 by the Pension Protection Act, Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987) ("PPA"). Because the PPA amendments do not apply in this case, citations in this brief are to ERISA as amended by SEPPAA, as found in 29 U.S.C. (1982 and Supp. IV 1986), unless otherwise noted.

The PBGC administers and enforces Title IV of ERISA (29 U.S.C. §§ 1301-1461), which includes a mandatory government insurance program that protects the pension benefits of over 30 million American workers in the private sector. Congress perceived a need for such pension insurance in order "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (quoting 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen)).

Pension insurance is funded primarily by statutorily-mandated premiums from employers who maintain pension plans covered by Title IV. 29 U.S.C. §§ 1306, 1307.[3] The insurance program is also financed by the statutory liability imposed on employers who terminate underfunded pension plans. Upon termination, the employer becomes liable to the PBGC, generally for 75 percent of the difference between the plan's assets and the benefits insured by PBGC. *See* 29 U.S.C. § 1362(b). However, because PBGC historically has recovered only a small portion of that liability, Congress repeatedly has been forced to increase the annual premiums.[4] Despite these increases,

[3] Title IV covers virtually all "defined benefit" pension plans sponsored by private employers. *See* 29 U.S.C. § 1321. A defined benefit pension plan is one that promises to pay employees, when they retire, a fixed benefit under a formula that takes into account such factors as final salary and years of service with the employer. It is distinguished from a "defined contribution" plan (also known as an "individual account" plan), under which the employer typically contributes a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. *See* 29 U.S.C. § 1002(34) and (35). Federal insurance does not cover defined contribution plans because employees are not promised any particular level of benefits, only that they will receive the balance in their individual accounts.

[4] When the PBGC was established in 1974, premiums were fixed at a flat annual rate of $1.00 per participant. The rate was raised in 1978 to $2.60, and in 1986 to $8.50. In the 1987 Pension Protection Act, a variable-rate premium was established, ranging from

PBGC reported liabilities of $4 billion and assets of only $2.4 billion in its fiscal year 1988 Annual Report, leaving a deficit in its insurance fund of more than $1.5 billion, exclusive of the more than $2 billion of liabilities at issue in this case. PBGC estimates that the ongoing pension plans it insures currently contain more than $16 billion of additional unfunded liabilities, over half of which is concentrated in the plans of only 7 companies.[5]

Title IV insurance may be paid only when a covered plan terminates. *See* 29 U.S.C. § 1322(a) (PBGC shall guarantee the payment of nonforfeitable benefits under a single-employer plan "which terminates"); § 1361 (PBGC shall pay benefits under a single-employer plan "terminated" under Title IV of ERISA). Termination is thus the insurable event under Title IV's single-employer program.

$16 to $50 per participant. (For citations, see PBGC certiorari petition at 4 n.4.)

[5] A pension plan may have insufficient assets to pay benefits even when statutory funding standards are met. Title I of ERISA requires employers to make "minimum funding" contributions to defined benefit pension plans each year. *See* 29 U.S.C. § 1082. The Internal Revenue Code imposes a parallel requirement as a condition to achieving favorable tax treatment. *See* 26 U.S.C. § 412. But neither requires all benefits earned to be funded immediately and fully. Rather, based on actuarial projections, an employer is entitled to amortize its funding liability over a period of years. When a new plan is established, for example, past service of employees may be credited and the liability amortized over 30 years. 29 U.S.C. § 1082(b)(2); 26 U.S.C. § 412(b)(2). Similarly, an increase in benefits, or an unexpected excess of benefit liabilities over actuarial projections, may be amortized over a period of years. *Id.* This can occur, for example, when financial difficulties cause the layoff of large numbers of employees who then commence receipt of their pensions far earlier than anticipated. Thus, a plan may be underfunded either because contributions have not been made, because the plan's payout of benefits has exceeded actuarial projections, or because new or past service liabilities have not been fully amortized.

Under the statute, plans may be terminated "voluntarily" by an employer or "involuntarily" by the PBGC. A plan may terminate voluntarily in a "standard" termination only if it has sufficient assets to pay all benefit commitments. 29 U.S.C. § 1341(b). If the plan's assets are insufficient to pay all benefits, the employer must demonstrate that it is in financial "distress," as defined in 29 U.S.C. § 1341(c). Neither standard nor distress terminations are permitted if termination would violate the terms of an existing collective bargaining agreement. 29 U.S.C. § 1341(a)(3).

A collective bargaining agreement does not bar an involuntary termination by the PBGC under 29 U.S.C. § 1342. *See* 29 U.S.C. § 1341(a)(3). The PBGC initiates an involuntary termination to protect the pension insurance program. Thus, the PBGC may initiate termination if it determines, for example, that a plan has not met ERISA's minimum funding standards, or that the risk to the insurance program may increase unreasonably if the plan is not terminated. 29 U.S.C. § 1342(a).

When an underfunded plan terminates, the PBGC becomes trustee of the plan and takes over the plan's assets and liabilities. The PBGC uses the plan's assets to pay as much of the benefits as they will cover. *See* 29 U.S.C. § 1344. The PBGC must then add its own funds to ensure payment—up to specified limits—of all remaining "nonforfeitable" benefits, *i.e.*, those benefits to which participants have earned entitlement under the terms of the plan or ERISA as of the date of termination. 29 U.S.C. §§ 1301(a)(8), 1322(a)-(b).

ERISA limits the benefits PBGC may guarantee upon plan termination. Retired participants cease receiving benefits in excess of the amounts insured by PBGC.[6]

[6] For plans terminating in 1987 (the year relevant here), the maximum monthly benefit PBGC may pay is $1,857.95. *See* 29 C.F.R. § 2621, Appendix A (1988); 29 U.S.C. § 1322(b)(3) ($750

Active plan participants (current employees) cease to earn additional pension benefits under the plan and lose entitlement to most benefits not yet fully earned on the date of plan termination. *See* 29 U.S.C. §§ 1322(a)-(b), 1301(a)(8); 29 C.F.R. § 2613.6 (1988).

Termination can be undone. Under section 4047 of ERISA, the PBGC has authority to reinstate a plan that is "in the process of being terminated" or that "has been terminated." 29 U.S.C. § 1347. Section 4047 provides:

> Whenever the corporation [*i.e.*, the PBGC] determines that a plan which is to be terminated under section 4041 or 4042, or which is in the process of being terminated under section 4041 or 4042, under this subtitle should not be terminated under section 4041 or 4042 as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 4041 or 4042. In the case of a plan which has been terminated under section 4041 or 4042, the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title [*i.e.*, Title IV of ERISA], to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

Id. Thus, section 4047 authorizes the PBGC "to take such action as may be necessary to restore [a terminated] plan to its pre-termination status" if "the [PBGC] determines such action to be appropriate and consistent with its

in 1974 dollars, adjusted for inflation). The maximum is lower if the participant retires before age 65 or has a spouse entitled to survivor benefits. *See id.*; 29 C.F.R. § 2621.4(c)-(e).

duties under [Title IV of ERISA]." *Id.* When a plan is restored, full plan benefits are reinstated, and the employer, rather than the PBGC, is again responsible for the plan's unfunded liabilities.

The PBGC has determined that restoration is "appropriate and consistent with its [Title IV] duties" where, after an underfunded pension plan is terminated and its liabilities are shifted to the PBGC, the employer establishes "follow-on plans." Follow-on plans are new benefit arrangements designed to wrap around PBGC insurance payments in such a way as to provide both retirees and active participants substantially the same benefits as if no termination had occurred. *See* AR 194, JA 229.[7] They effectively continue the plan and make up the benefits that PBGC does not insure. Retired employees receive most or all of their non-guaranteed benefits. Active employees are able to combine service under the old plan with service under the new plan to earn additional benefits based on total years of service. This results in PBGC subsidizing an employer's ongoing pension program.[8]

The PBGC has determined that such follow-on pension arrangements abuse the pension insurance program. As the PBGC stated when the follow-on plan issue first arose in 1981, "If PBGC guarantees were to be paid under such

[7] The designation "AR" refers to the 1,592-page administrative record of the PBGC's restoration decision, excerpts from which are included at Pet. App. 159a-182a and in the Joint Appendix ("JA") filed with this brief. The entire administrative record is contained in exhibits to the joint appendix filed in the court of appeals, with the original pagination retained. Hereinafter, citations to AR are given only for items that are not in the present Joint Appendix.

[8] The PBGC does not object to all post-termination pension arrangements—it objects only to those that result in its insurance funds being used as a subsidy for an ongoing pension program. For example, the agency has never objected to employees earning new pension benefits based solely on their post-termination service. *See* JA 228-30.

circumstances," then any company with substantial unfunded pension liabilities "could find it advantageous to establish similar arrangements to secure PBGC's payment of the major portion of its costs of an ongoing retirement program." Pet. App. 168a. Accordingly, PBGC concluded in that case and two other cases involving different employers that the establishment of abusive follow-on plans would negate or preclude the termination of the pension plans at issue.[9] PBGC also warned that to prevent such follow-on plan abuse, the agency would "exercise its authority under Section 4047 of ERISA to restore . . . the previously terminated plans." Pet. App. 178a.

Facts and Proceedings

This case arose after The LTV Corporation ("LTV Corp.") and many of its subsidiaries, including LTV Steel Company, Inc. ("LTV Steel") (collectively "LTV") filed Chapter 11 petitions for reorganization in the United States Bankruptcy Court for the Southern District of New York in July 1986. Pet. App. 6a-7a. LTV Steel had sponsored three defined benefit pension plans (the "Plans"), two of which had been negotiated in collective bargaining with the United Steelworkers of America ("USWA" or "union"). The third plan was for non-union, salaried employees. Historically underfunded, the Plans had, by late 1986, total unfunded liabilities for promised benefits of almost $2.3 billion. *See* JA 138. Approximately $2.1 billion was covered by PBGC insurance. *See id.*

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[9] PBGC Opinion Letter 81-11, Pens. Rep. (BNA) No. 367 at R-3 (May 11, 1981), LEXIS, Labor Library, PBGC file (Pet. App. 159a); PBGC Opinion Letter (unpublished) (April 24, 1981) (Pet. App. 165a); PBGC Opinion Letter 86-27, 14 Pens. Rep. (BNA) No. 10 at 306 (Dec. 17, 1986), LEXIS, Labor library, PBGC file (Pet. App. 172a).

As the district court stated, "LTV readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. This could happen only if the Plans were terminated, with the PBGC assuming responsibility for the unfunded liabilities, and new pension arrangements could be negotiated. LTV, however, could not terminate the Plans voluntarily because the USWA objected to termination. *See* JA 241-42; 29 U.S.C. § 1341(a)(3).

In December 1986, LTV advised the PBGC that the company could not and would not fund the Plans. JA 126. PBGC's internal working group estimated that, without further funding, the Plans' $2.1 billion underfunding would increase by $65 million by December 1987 and by another $63 million by December 1988, unless the Plans were immediately terminated. JA 138. Moreover, extensive plant shutdowns were projected which—if they occurred before the Plans terminated—would have required the payment of "shutdown benefits."[10] PBGC estimated that such benefits could increase the Plans' liabilities by as much as $300 to $700 million, up to $500 million of which would be covered by PBGC insurance. JA 138. Consequently, the PBGC decided to terminate the Plans to protect the insurance program from the unreasonable risk of large losses. *See* JA 140; AR 1257, 1384, 1507; 29 U.S.C. § 1342(a).

The PBGC accordingly commenced termination proceedings in the United States District Court for the Southern District of New York, pursuant to 29 U.S.C.

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[10] Under the Plans, a plant shutdown makes certain participants eligible for "shutdown benefits," accelerating their entitlement to a pension, with no reduction in the amount of that pension to reflect the earlier benefit commencement date. Shutdown benefits are insured if the shutdown occurs before termination, but not if it occurs after. *See* 29 U.S.C. §§ 1301(a)(8), 1322(a); 29 C.F.R. § 2613.5-.6 (1988).

§ 1342. With LTV's consent, the Plans were terminated effective January 13, 1987. JA 141-42; AR 1536-41. Upholding the terminations against a USWA challenge, the Court of Appeals for the Second Circuit explicitly noted that PBGC could restore the Plans if subsequent events warranted it. *Jones & Laughlin Hourly Pension Plan v. The LTV Corp.*, 824 F.2d 197, 202 (2d Cir. 1987).

Because Plan participants lost benefits as a result of the termination, the USWA filed an action against LTV in the bankruptcy court, challenging the terminations and seeking to have LTV make up the lost benefits. *See* Pet. App. 43a. In settlement of that action, LTV Steel and the union negotiated an interim collective bargaining agreement that included follow-on plans specifically designed to continue service under the terminated Plans and to make up benefits lost under those Plans. *See* JA 156, 158-61. Participants were thereby placed in virtually the same position they would have been in if the old Plans had never terminated. JA 156-60, 289-93. For example, payments to retirees were explicitly calculated as "a percentage of the difference between the benefit that was being paid under the Prior Plans and the amount paid by the PBGC." JA 181. Thus, as the union advised its members:

- Those retirees who are receiving $550 or more per month from the PBGC will recover 90 percent of their losses.
- Those retirees who are receiving between $400 and $549 per month will recover 95 percent.
- Those retirees receiving less than $400 will receive 100 percent restoration.

USWA Summary of Proposed Agreement between USWA and LTV Steel, JA 289.

Similarly, follow-on benefits for active participants were expressly designed to replace benefits under the old

Plans that were not insured by PBGC, such as certain early retirement benefits and shutdown benefits based on plant closings that might occur after termination of the old Plans. As LTV stated in the bankruptcy court, the follow-on plans "provide[] for benefits in the event of future shutdowns of LTV Steel plants. The benefits will total 75% of benefits lost as a result of plan termination." JA 159. The 75 percent was supplemented by other follow-on benefits so that, in some cases, the follow-on plans provided more than 100 percent of lost benefits. JA 235.[11]

As soon as these new benefit arrangements were first tentatively negotiated in May 1987, the PBGC advised LTV that they violated the PBGC's longstanding policy against abusive follow-on plans. JA 230. Thereafter, PBGC representatives had a series of meetings with LTV and union representatives to discuss PBGC's objections. JA 262, 348. In these meetings, PBGC also advised the parties of alternative arrangements that would be satisfactory to PBGC. JA 262-67.

LTV and the USWA rejected PBGC's advice, however, and LTV asked the bankruptcy court for permission to fund the follow-on plans. JA 150. The bankruptcy court granted LTV's request. JA 261; AR 1554-56. In doing so, the bankruptcy court noted that PBGC "may have legal options or avenues that it can assert administratively . . . to implement its policy goals. Nothing done here tonight precludes the PBGC from pursuing these options . . . ." JA 261.

By August 1987, each of the financial factors on which the PBGC had relied in terminating the Plans had changed significantly. The steel industry, including LTV Steel, was experiencing a dramatic financial turnaround,

[11] For its salaried employees and retirees, LTV established follow-on plans that were "comparable in every respect" to the follow-on plans negotiated with the union. AR 508.

contrary to the predictions of experts in late 1986. *See* JA 314-15. Information LTV submitted to its creditors indicated that LTV had substantially exceeded its business projections of operating income. *See* JA 344. Consistent with this turnaround, and contradicting LTV's earlier claim that it could not and would not fund the Plans, LTV had sought and obtained bankruptcy court approval to fund the new follow-on plans at a cost of at least $90 million per year. JA 261, 315; AR 1554-56.[12] It also had obtained bankruptcy court approval to contribute another $90 million in cash and stock to a previously established Employee Investment Program. JA 317; AR 1545-53. These amounts combined were approximately the same as LTV's annual minimum funding contribution for pre-termination years, and were not significantly less than the amount LTV would have to contribute to the Plans in 1987 (for plan years 1984-86) if the Plans were restored. *See* JA 317.

Finally, an LTV official had testified in the bankruptcy court that, with only one exception, none of LTV Steel's plants would be shut down in the next several years. JA 255-56. The PBGC therefore no longer faced the imminent risk, central to its decision to terminate the Plans, of huge additional unfunded liabilities for guaranteed shutdown benefits.

In August 1987, PBGC's internal working group commenced a series of meetings to consider information obtained from LTV bearing on its changed financial outlook and the abusive follow-on plans. The PBGC reviewed LTV's bankruptcy court testimony about the shutdowns (JA 255-56, 316), and the papers, including the follow-on plans, that LTV filed in support of its application to the bankruptcy court to approve funding for those

[12] This amount alone (in the absence of additional shutdown liabilities) would have prevented the immediate "deterioration of the financial condition" of the Plans, 29 U.S.C. § 1342(c), with which PBGC was concerned when it terminated them. *See* JA 138.

plans. JA 150-222, 314-15. The PBGC also reviewed LTV's own financial data and analyses provided to the SEC in its Forms 10-K and 10-Q (AR 671-1084), and compared that actual data to the projections set forth in LTV's 1987-88 Operating Plan (JA 6-120). JA 344.[13] In addition, the PBGC reviewed a report of LTV's Creditors' Committee, which was also based on data provided by LTV. AR 15-98; JA 317. Finally, the working group reviewed the report of PBGC's financial analyst, which concluded on the basis of the foregoing information that LTV could now afford to fund the Plans, at least for "the immediate future." JA 345, 317-18.

PBGC's internal working group recommended that the agency's Executive Director restore the Plans. JA 318-20. The Executive Director then consulted PBGC's Board of Directors. The Board discussed the facts of the LTV case and reviewed its longstanding opposition to abusive follow-on plans. Pet. App. 180a-81a. It then unanimously affirmed the authority of the Executive Director to determine when particular plans should be restored. *Id.*

Before making a decision, the Executive Director reviewed all of the materials in the Administrative Record, including a series of letters between her principal deputy and LTV officials in which restoration was discussed. *See* JA 330-39. She also reviewed the results of meetings between LTV and PBGC representatives that she had initiated to elicit "any additional information [LTV] might wish to supply" concerning a decision to restore the Plans. JA 348; *see* JA 356-57, 360-61.

[13] That Operating Plan, released in December of 1986, was the source of much of the financial information that PBGC had relied on in terminating the Plans. JA 6-120. At the time of termination, however, PBGC believed the Operating Plan's projections to be "optimistic." JA 129. The later SEC filings demonstrate that the projections were instead pessimistic, and that LTV's actual results had dramatically exceeded its projections. *See* JA 344.

On September 22, 1987, the Executive Director issued a Notice of Restoration, returning the Plans to their pre-termination status. Pet. App. 182a. Her decision was based on LTV's establishment of the abusive follow-on plans, its financial improvement, and its willingness to fund new pension arrangements. *Id.* Restoration meant that the Plans were ongoing and that LTV was again responsible for administering and funding them.

When LTV refused to comply with the restoration, the PBGC brought an enforcement action in the United States District Court for the Southern District of New York in October 1987. Pet. App. 51a-52a. Meanwhile, LTV filed an action in the bankruptcy court alleging that the restoration violated the "automatic stay" provision of the Bankruptcy Code, 11 U.S.C. § 362(a). Pet. App. 34a. In a decision reported at 86 Bankr. 33, the district court withdrew this action from the bankruptcy court pursuant to the PBGC's motion under 28 U.S.C. § 157(d), and considered both actions together. Pet. App. 34a.

The Decision of the District Court

The district court held that restoration did not violate the automatic stay in bankruptcy, and was, in any event, a governmental regulatory action exempted from the automatic stay by 11 U.S.C. § 362(b)(4). But, the district court concluded, PBGC's restoration decision was unlawful.

The district court conceded that "Section 4047 contains little in the way of restrictive language." Pet. App. 85a. It nevertheless held that restoration could not be based on an employer's establishment of follow-on plans. This was because "[t]he legislative history accompanying the enactment of section 4047 reveals that Congress expressly identified only improvements in the financial condition of the plan and its sponsors as possible grounds for restoration." Pet. App. 93a-94a. The district court found additional support for its conclusion in the fact that Congress,

in amending ERISA in 1987, did not enact a proposal that would have precluded employers from establishing follow-on plans. Pet. App. 97a-99a.

The district court further held that "the Record does not support a finding that the PBGC's determination that the [follow-on plans] were abusive represents a reasonable accommodation of conflicting policies within Title IV and between Title IV and other non-ERISA laws." Pet. App. 100a. In the district court's view, the opinion letters setting forth PBGC's policy against abusive follow-on plans (Pet. App. 159a-179a) were irrelevant because the terminations addressed in them were "voluntary," rather than "involuntary" as in this case. Pet. App. 100a-101a. Finally, although it was "not disputed that one of the USWA's primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" or that the new plans "substantially achieved that goal," Pet. App. 109a, the district court concluded that the record was insufficient to show that LTV's follow-on plans effectively continued the old Plans. Pet. App. 107a-109a.

The district court also held that the administrative record did not support restoration for financial improvement. In the district court's view, restoration is appropriate only where the PBGC demonstrates an employer's ability to fund its plans over the long term.

The district court did find that the PBGC "acted within its authority in attempting to evolve standards for restoration during an ongoing restoration proceeding." Pet. App. 124a. It concluded, however, that the PBGC failed "to set forth those standards with sufficient clarity to permit LTV to challenge them," Pet. App. 125a, and that the PBGC's procedures were therefore inadequate.

The Decision of the Court of Appeals

The court of appeals affirmed the district court's decision in all relevant respects. The court of appeals agreed with the district court that restoration is a governmental regulatory action, exempt from the automatic bankruptcy stay pursuant to 11 U.S.C. § 362(b)(4). Pet. App. 24a. The court held, however, that the PBGC's decision to restore the Plans was "arbitrary and capricious" because the PBGC "focused inordinately on ERISA" and failed to honor the "policies and goals" of other laws. Pet. App. 17a. In the court's words, "Although this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." Pet. App. 16a.

The court also held that the PBGC lacks statutory authority to restore pension plans on the basis of follow-on abuse because "[t]he legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration." Pet. App. 17a.

Although the court agreed with the PBGC that "improvement in financial circumstances is a basis for restoration," Pet. App. 21a, it rejected the PBGC's determination that LTV's financial improvement warranted restoration. The court held that restoration for improved financial circumstances may be based only on "the long term ability of LTV to fund the Plans." Pet. App. 24a. Here, the court decided, "LTV's apparent ability to fund the Plans suffers" because "any claims arising out of LTV's obligation to pay into the pension fund plans are pre-petition debts" that cannot be paid except in a proportional distribution with other general unsecured creditors pursuant to a plan of reorganization. Pet. App. 23a-24a.

Finally, the court held that the PBGC's decision, which was reached through informal adjudication, was arbitrary and capricious because the agency's procedures were inadequate. Pet. App. 26a.

Accordingly, the court affirmed the judgment of the district court and remanded the case to the PBGC. Pet. App. 27a.

SUMMARY OF ARGUMENT

1. PBGC acted within its authority when it restored the LTV Plans as a remedy for the establishment of abusive follow-on plans. Section 4047 of ERISA authorizes restoration in any case "in which the corporation determines such action to be appropriate and consistent with its duties under [Title IV]." Thus, the statute not only establishes a flexible standard, but explicitly delegates to the PBGC the role of determining when it is satisfied. Given the sweep of that statutory delegation, resort to the legislative history is unnecessary.

In any event, that history confirms the breadth of PBGC's powers under this provision. In both the statute and its history, Congress expressed its desire that pension plans continue rather than terminate, a preference which is served whenever a plan is restored. The Conference Committee indicated that restoration could take place not only for changed financial circumstances, but when PBGC determined that "some other factor made termination no longer advisable." Recognizing that clever employers could take advantage of the federal insurance program, Congress imposed statutory limits on the benefits guaranteed, and granted the PBGC broad authority to restore terminated plans when necessary to block abuse.

The court of appeals restricted PBGC's authority by an egregious misuse of legislative history. It reduced PBGC's restoration authority to one example made explicit in the Conference Report, thereby ignoring other expressions of congressional intent and effectively nullifying the broad statutory language. An inference based upon a purported omission in the legislative history cannot be the basis for restricting express statutory language. *See Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980).

The court of appeals also used Congress's failure in 1987 to pass a more sweeping prohibition on replacement plans as evidence of its intent in 1974 with respect to section 4047. Such subsequent legislative history—and particularly such highly ambiguous inaction—"has no persuasive significance." *United States v. Wise*, 370 U.S. 405, 411 (1962). It is equally, if not more, plausible that Congress approved of PBGC's use of its authority under section 4047 when, after the restoration in this case, it extensively amended Title IV of ERISA but did not limit PBGC's restoration powers.

The PBGC's interpretation of section 4047 was a proper exercise of agency discretion. The PBGC's policy against abusive follow-on plans derives from its expertise and experience with the operation of the federal insurance program. Follow-on plans undermine the statutory limitations on the PBGC's guarantee and eliminate its insurable event—plan termination. They divert insurance funds—intended to be used to provide basic benefits to workers at plan termination—to subsidize an employer's ongoing operations and benefit programs. By eliminating the adverse consequences associated with termination, follow-on plans make invocation of the federal guarantees an irresistible alternative for financially troubled employers and thereby threaten the solvency of the insurance program. Because PBGC's exercise of its discretion was not precluded by Congress and was not unreasonable, the court of appeals should not have substituted its judgment for that of the agency to which Congress expressly delegated restoration authority. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

2. Restoration of the Plans was also proper because each of the financial circumstances that had necessitated termination had changed. This decision was one that the agency, in light of its expertise and experience, was par-

ticularly well equipped to make. The court of appeals, however, rejected the PBGC's financial standard and, with no statutory basis, held that PBGC was required to show that LTV could afford to fund the Plans over the long term before restoring them. This holding impermissibly restricts the PBGC's statutory discretion and, as a practical matter, virtually eliminates the agency's restoration authority.

3. The court of appeals erred in holding that PBGC "focused inordinately on ERISA" and failed to accommodate general policies underlying bankruptcy and labor law. A requirement that an agency enforcing its statutory mandate must balance the policies of myriad other unidentified statutes would cripple the administrative process. The court's rationale was especially unwarranted here because section 4047 explicitly directs PBGC to look to its duties under Title IV in making restoration decisions. This case did not involve a direct conflict between Title IV and any other statute, *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984), or a jurisdictional conflict between agencies. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962). Indeed, no provision of Title IV or of bankruptcy or labor law required PBGC to take account of bankruptcy or labor "policies." In fact, Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws. If the courts may nevertheless create their own harmonizing principles in cases such as this, then no administrative decision will be immune from judicial remand.

4. The Administrative Procedure Act does not prescribe procedures for cases like this, where due process rights are not implicated and an agency's enabling statute contains no procedural requirements. The principle enunciated by the Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978)—that procedures should be left within the discretion of agencies—should apply equally to the informal adjudication in this case.

The PBGC's procedures, in any event, were thorough and fair. LTV can claim neither surprise nor prejudice. It had notice of the PBGC's impending action, and the PBGC considered the company's views. To impose more cumbersome requirements, as the court of appeals did, is to limit the PBGC's decisionmaking authority and its need for prompt action in the face of serious abuse of the pension insurance program.

ARGUMENT

I. PBGC ACTED REASONABLY AND WITHIN THE SCOPE OF ITS BROAD AUTHORITY UNDER SECTION 4047 WHEN IT RESTORED THE PLANS IN RESPONSE TO LTV'S ABUSE OF THE PENSION INSURANCE PROGRAM.

A. Congress Delegated PBGC Broad Restoration Authority under Section 4047 of ERISA.

Section 4047 accords the PBGC discretionary authority to restore a terminated pension plan "in any such case in which the corporation determines such action to be appropriate and consistent with its duties under [Title IV of ERISA]." 29 U.S.C. § 1347. Thus, employing exceptionally broad criteria, Congress explicitly delegated to the PBGC the authority to determine when restoration of a pension plan is "appropriate and consistent" with the agency's duties under its enabling statute. In view of the plain language of the statute, a resort to legislative history is unnecessary to define the scope of PBGC's authority. *See Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947).[14]

[14] As a unanimous Court said in *Burlington Northern*:

Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

481 U.S. at 461.

In any event, the legislative history to ERISA, as well as other provisions of Title IV, makes clear that Congress intended PBGC to have broad discretion to reverse the termination of a pension plan. Throughout Title IV and its legislative history, Congress emphasized its preference for ongoing pension plans. In fact, one of the purposes of Title IV is to "encourage the continuation and maintenance of voluntary private pension plans." 29 U.S.C. § 1302(a)(1). Thus, Congress deliberately placed limitations on PBGC's guarantee, because there is "an advantage in not fully covering all pension benefits in that this encourages those receiving the larger benefits, and who often are in a management position, to see to it that there is adequate funding of the pension plan." S. Rep. No. 383, 93d Cong., 1st Sess. 81 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4965.

Congress recognized, moreover, that the pension insurance program was susceptible to abuse by employers. *See* 120 Cong. Rec. 4283, 29931 (1974); S. Rep. No. 383 at 87, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4971. An employer, for example, might "rely on the insurance [program] as the backup which enables it to be more generous in promising pension benefits to meet labor demands than would be the case if it knew that the benefits would have to be paid for entirely out of the assets of the employer." *Id.* Congress was also concerned that an employer might rely on plan termination "to renege on his agreement to contribute to the plan with impunity" and might shift the amount of his unfunded vested benefits to the PBGC. 120 Cong. Rec. 4283.

In section 4047, Congress gave PBGC a tool to reverse terminations whenever the agency determines such action to be "appropriate and consistent with its duties." Section 4047 was added to ERISA in conference, and as the Conference Report accompanying the provision explains:

> Neither the House bill nor the Senate amendment had any specific provision that procedures against a plan in the termination phase might be abandoned by the corporation if the employer and plan enjoyed a favorable reversal of business trends, *or if some other factor made termination no longer advisable.*
>
> Under the conference substitute, the corporation may cease any termination activities and do what it can to restore the plan to its former status. As a result, a terminated plan being operated by a trustee as a wasting trust may be restored if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent. The corporation may, when appropriate, transfer to the employer or plan administrator part or all of the remaining assets and liabilities.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58 (emphasis added).

In 1986, Congress enacted extensive amendments to ERISA in SEPPAA. One of the SEPPAA provisions amended section 4047.[15] With regard to that change,

[15] Before SEPPAA, section 4047 stated that the PBGC could restore a plan terminated "under section 4042." 29 U.S.C. § 1347 (1982). At that time, section 4042 was the sole statutory vehicle for both voluntary and involuntary terminations of underfunded pension plans. *See* 29 U.S.C. § 1341(c) (1982). Under SEPPAA, employer-initiated terminations of underfunded plans may proceed exclusively under section 4041. 29 U.S.C. § 1341(c) (Supp. IV 1986). Congress accordingly amended section 4047 to state that the PBGC could restore a plan terminated "under section 4041 or 4042," 29 U.S.C. § 1347 (Supp. IV 1986), to make clear that section 4047 still permits the restoration of both voluntarily and involuntarily terminated underfunded plans.

Senator Nickles, the Senate floor manager of SEPPAA, stated, "I expect that the [PBGC] will block . . . abuses of the new termination rules under Title IV by using its authority under section 4047 to negate pending or completed plan terminations and restore plans to their pretermination status." 132 Cong. Rec. 4887 (1986).

The legislative history therefore confirms what the plain language of the statute says—that Congress granted PBGC the discretion to decide when to restore pension plans, and that it intended the agency to do so whenever the PBGC determines that restoration is "appropriate and consistent" with its statutory duties.

B. The Court of Appeals Misused Legislative History to Restrict PBGC's Congressionally Delegated Authority.

Pursuant to its broad grant of authority, PBGC has construed Section 4047 to permit restoration where an employer abuses the pension insurance program by adopting follow-on plans. This construction is plainly *not* "contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. *See also Burlington Northern*, 481 U.S. at 461; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. at 108. It should therefore have been sustained.

Ignoring the plain language of the statute, the court of appeals held that PBGC was precluded from using its restoration authority to remedy follow-on abuse. Departing entirely from traditional principles of statutory construction, the court perused the legislative history, not for a clearly expressed legislative intent contrary to PBGC's interpretation, but rather in search of an explicit affirmation that Congress intended restoration to be used to prevent follow-on abuse. Finding none, the court focused on the one example mentioned in the legislative history—improved financial circumstances—and concluded that PBGC's authority under section 4047 was limited to that

ground. This clearly was error. The mere mention in the legislative history of one *example* of when the agency may exercise its delegated authority cannot conceivably limit that authority, particularly when the example does not even purport to do so. *See Standefer v. United States*, 447 U.S. at 20 n.12 (such an argument "would permit an omission in the legislative history to nullify the plain meaning of a statute").

The court compounded its error by relying on Congress's inaction in December of 1987 on a House Ways & Means Committee proposal to ban all post-termination pension plans. As the court itself acknowledged, Pet. App. 18a, this proposal, which failed almost three months after PBGC's decision in this case, would not have been applicable even if enacted. Moreover, the proposal that was before the Committee was of broader scope than PBGC's longstanding follow-on policy.[16] The court nevertheless concluded that Congress's failure to enact this proposal "reflect[ed] the continuing consensus not to include the establishment of follow-ons as a basis for a restoration decision." *Id.*

As this Court has repeatedly cautioned, subsequent legislative history is a "hazardous basis" for inferring the intent of an earlier Congress. *E.g., Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. 948, 956 (1989); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. at 117; *United States v. Price*, 361 U.S. 304, 313 (1960). Subsequent legislative history is a particularly dangerous basis for interpreting a prior statute when it involves,

[16] This proposal would have prevented not only the sponsor of a terminated plan, but all members of the sponsor's controlled group, from establishing *any* post-termination retirement plan without PBGC's permission for five years after termination, unless all liabilities to the PBGC had been paid. H.R. 3545, 100th Cong., 1st Sess. § 9532(e) (1987). PBGC's policy does not prohibit the adoption of non-abusive post-termination benefit arrangements, and does not implicate employees of other companies in the sponsor's controlled group. *See supra* at 7 n.8.

as here, a proposal that does not become law. Congressional inaction "has no persuasive significance" because "several equally tenable inferences" may be drawn from such inaction, "including the inference that the existing legislation already incorporated the offered change." *United States v. Wise*, 370 U.S. at 411. *Accord Bruch*, 109 S.Ct. at 956 ("The bill's demise may have been the result of events that had nothing to do with Congress' view on the propriety of [the issue in question]"). For a court nevertheless to rely on it therefore creates a substantial risk that the views of a few representatives will be used to undo the work of the majority that passed the original statute.

These principles are particularly applicable here. Congress was well aware when it made extensive revisions to ERISA in the Pension Protection Act in 1987 that the PBGC, consistent with its longstanding policy, had just restored the LTV plans. *See* H.R. Rep. No. 391, 100th Cong., 1st Sess., pt. 1, at 106-07, 178, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1, 2313-81, 2313-149; Congressional Budget Office, *Federal Insurance of Private Pension Benefits* 25 n.1 (October 1987). Despite that knowledge, Congress did not amend section 4047 to restrict PBGC's restoration authority. Thus, the inference that Congress approved of PBGC's policy is far more powerful than the one the court of appeals drew. *See Bob Jones University v. United States*, 461 U.S. 574, 599 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned") (citation omitted).

In sum, PBGC's interpretation of its restoration authority is consistent with the broad language of section

4047, with the functioning of the statutory scheme, and with contemporaneous statements of congressional purpose. The court of appeals erred in concluding that the agency was precluded from adopting its interpretation of the statute simply because, after the agency had invoked its statutory powers to prevent abuse, a subsequent Congress failed to enact an even more sweeping prohibition.

C. PBGC Reasonably Determined that Restoration for Follow-on Abuse was Appropriate and Consistent with its Duties under Title IV of ERISA.

Because the statute explicitly confers upon the agency and not the courts the power to decide whether the broad criteria of section 4047 are met, the PBGC's decision must be sustained unless an abuse of discretion is plainly shown. *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977); *see Chevron*, 467 U.S. at 843-44; *Chenery*, 332 U.S. at 208-09. Like the "fair and equitable" and "public interest" standards in the Holding Company Act that this Court addressed in *Chenery*, the "appropriate and consistent" standard in section 4047 was devised to give the PBGC broad power to develop criteria to deal with specialized problems on a case-by-case basis. *See id.* at 202-03, 208. The exercise of that power necessarily requires the formulation of policy and the use of informal discretion to evolve standards to complete the legislative scheme. *Id.* at 203; *see also Chevron*, 467 U.S. at 843. In exercising its discretion in this case, the PBGC relied on its administrative experience, including its appreciation of the statutory purposes and the complexities of the problem of abuse of the pension insurance program.[17]

[17] The PBGC had full authority to interpret and apply Section 4047 for the first time in its adjudication in this case. *Chenery*, 332 U.S. at 203. The PBGC's decision, however, was based on a long-standing agency policy, articulated as early as 1981 in Opinion Letter 81-11, and consistently followed and applied since that time. And contrary to the court of appeals' view, these opinion letters were plainly applicable, notwithstanding the fact that they "all involve cases of voluntary rather than involuntary terminations." Pet. App. 20a. Section 4047 applies to all terminations of insufficient plans, whether initiated by the employer under section 4041 of ERISA or the agency under section 4042. Because one of PBGC's duties is to limit the transfer of unfunded pension liabilities onto the single-employer pension insurance program to "cases of severe hardship," 29 U.S.C. § 1001b(b), it exercises its discretionary authority to terminate pension plans involuntarily when the risk to participants and the insurance program leave it no other choice. If follow-on plans are available, an employer may take steps, such as refraining from making contributions, to compel an involuntary termination by the agency. In most cases, in fact, it is actions of an employer that give rise to the need for an involuntary termination. Here, for example, LTV did everything it could to impel PBGC to terminate the Plans involuntarily. *See supra* at 9.

The PBGC decided, as a matter of policy, that restoration was an appropriate remedy for LTV's abusive follow-on plans. The wisdom of that policy is not before this Court. *Chevron*, 467 U.S. at 865-66; *Chenery*, 332 U.S. at 207. Rather, the Court's duty ends when it becomes apparent that the PBGC's policy "is a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 866. It plainly is.

The PBGC has determined that follow-on plans abuse the pension insurance program and may be a basis for restoration for two reasons. Follow-on plans eviscerate the statute's coinsurance features, thereby eliminating the checks on termination of underfunded plans that are built into Title IV. *See* PBGC Opinion Letter 81-11, Pet. App. 162a-63a. They also negate plan termination—Title IV's insurable event—and thereby contravene the fundamental premise of Title IV, as construed by PBGC, that insurance is to be paid only when a pension arrangement terminates in substance as well as in form. *See* PBGC Opinion Letter 86-27, Pet. App. 172a-73a.

Congress limited the benefits PBGC may pay when an underfunded plan terminates "because [Title IV] in-

surance is not intended as a full replacement of a pension plan, but rather as covering the basic retirement benefits provided under it." S. Rep. No. 383 at 81, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4965. In practice, it was "expected that [the insurance] will fully cover the great bulk of all benefit payments." *Id.*[9] As noted above at page 21, however, Congress believed there was an advantage in limiting the benefits that would be paid, since that would encourage adequate funding of pension plans, and therefore discourage plan termination. *Id.* at 81-82.

The limitations on pension insurance payments thus operate as a form of coinsurance. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989). Not only do they encourage employees to see that their pension plan is adequately funded, but they also align the interests of employees with the PBGC and against termination. *Id.* The limitations thus are important to one of Congress's central purposes under Title IV—encouraging ongoing plans and limiting plan terminations. 29 U.S.C. §§ 1001b(b), 1302(a)(1).

Follow-on plans greatly minimize or even eliminate this coinsurance feature of Title IV because they effectively do away with the benefit limitations. Those benefits PBGC does not guarantee—or a substantial portion of them—are paid from the follow-on plans. *See supra* at 7. Thus, follow-on plans enable an employer to overcome the resistance of its employees and their union to termination, as happened in this case. *See supra* at 10-11. If follow-on plans are permitted, they will inev-

[9] In this case, for example, approximately 91 percent of the benefits of LTV's retirees were covered by pension insurance. JA 234. The follow-on plans made up 90-100 percent of the retirees' non-insured benefits. *Supra* at 10. In addition, the follow-on plans gave active employees credit for their service under the old Plans, thereby allowing them to earn and receive benefits to which they would not otherwise have been entitled. *Id.*

itably lead to additional terminations that would jeopardize the pension insurance program.

PBGC has also determined that follow-on plans abuse the pension insurance program and may warrant restoration because they result in PBGC effectively subsidizing an ongoing pension arrangement, rather than providing basic benefits to workers who would otherwise have none when their pension plan terminates. Title IV makes clear that PBGC's role is to provide benefits when an underfunded single-employer plan *terminates*. Thus, 29 U.S.C. § 1322(a) states that PBGC shall guarantee the payment of all nonforfeitable benefits under a single-employer plan "which terminates." Likewise, 29 U.S.C. § 1361 provides that PBGC "shall pay benefits under a single-employer plan *terminated* under this title." (Emphasis added.)[10] Follow-on plans are inconsistent with the statutory scheme because they use PBGC insurance to fund employers' ongoing benefit programs. Consequently, PBGC's insurable event—termination—has not in substance occurred.

Follow-on plans therefore convert PBGC insurance from a safety net of last resort for workers into an unintended subsidy for a company's ongoing pension program. And if one company is allowed to obtain such a

[10] Congress's choice of words in section 1361 was plainly deliberate, for in the next sentence it stated that PBGC "shall provide financial assistance to pay benefits under a multiemployer plan which is insolvent under [29 U.S.C. § 1426 or § 1441(d)(2)(A)]." Thus, *insolvency*, not termination, is the insurable event under the multiemployer insurance program. Insolvent multiemployer plans reduce benefits, 29 U.S.C. § 1426, and, if necessary, obtain financial assistance from the PBGC "to enable *the plan* to pay basic benefits under the plan." 29 U.S.C. § 1431(a) (emphasis added). Congress could have similarly provided that PBGC should provide financial assistance to ailing single-employer plans to enable them to pay benefits while ongoing, but chose instead to permit the payment of insurance funds only when a single-employer plan *terminates*, and thus to define the insurable event as termination.

PBGC subsidy for its pension costs, other companies with severely underfunded pension plans will surely try to follow its example. Indeed, they may be forced to do so to keep up with competitors who have reduced costs by unloading their pension liabilities on the PBGC. *See* brief *amicus curiae* of Armco, Bethlehem Steel Corp., *et al.* The resulting terminations could overwhelm PBGC, whose deficit (even without the LTV Plans) already exceeds $1.5 billion. Congress could raise PBGC's premiums, but employers with well-funded plans would likely balk at having to increase their payments to subsidize other, less responsible employers. They might well choose to terminate their plans or convert them to defined contribution plans not covered by Title IV, leaving the pension insurance program with a smaller base of healthy premium payers. Indeed, this is already occurring. *See* J. Chernoff, *Crushed by the Weight*, Pensions and Investment Age 1, 55 (September 4, 1989).

Thus, by using its restoration authority to remedy follow-on abuse, PBGC discourages employers from terminating their pension plans. This is clearly appropriate and consistent with the agency's statutory duties. It furthers the congressionally stated purposes of encouraging the continuance of pension plans, of providing for the timely and uninterrupted payment of benefits to all persons protected by the insurance program, and of maintaining premiums at reasonable levels. *See* 29 U.S.C. § 1302(a).

Under these circumstances, PBGC's determination to use its restoration authority in response to the establishment of follow-on plans is plainly reasonable. And the court of appeals did not truly find otherwise. Instead, the court merely disagreed with the wisdom of PBGC's policy choice, and took it upon itself to substitute its views for those of the agency. In doing so, the court not only ignored the admonition of this Court that "[o]ur

Constitution vests such responsibilities in the political branches," *Chevron*, 467 U.S. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)), it also ignored Congress's plain and unequivocal delegation of authority to the PBGC to decide when and on what grounds terminated pension plans should be restored.[20]

[20] Although it was evidently not a basis for the court of appeals' judgment, since the court struck down PBGC's follow-on policy as a matter of law, the court also concluded that PBGC did not adequately show that LTV's follow-on plans substantially replace the benefits lost as a result of the termination. Pet. App. 19a. This, too, was error. PBGC must have flexibility in combating abuse of the pension insurance program. *Cf. Chenery*, 332 U.S. at 207-08 (abuse may raise questions so subtle that the law can deal with it only by a broad prohibition). Thus, the agency has reasonably determined that its follow-on policy applies even if there are "relatively small differences" between pre- and post-termination benefits. Opinion Letter 86-27 n.5, Pet. App. 177a. Similarly, PBGC has made a rational determination that all of the components of an employer's post-termination scheme should be considered together in determining whether it constitutes a *de facto* continuation of the terminated plans. PBGC Opinion Letter 81-11, Pet. App. 162a; PBGC Opinion Letter 86-27, Pet. App. 177a. The court of appeals apparently believed that there must be virtual identity between the old and new plans. Under its view, however, sophisticated parties could easily circumvent PBGC's policy. They could, moreover, hamstring the agency with endless hair-splitting litigation, thereby undercutting the discretionary powers that are necessary to make the PBGC's enforcement scheme function.

In any event, PBGC's determination that LTV's follow-on plans were abusive was plainly reasonable. The administrative record showed that the follow-on plans replaced 90-100 percent of the benefits lost by retirees, and granted credit to active participants for their service under the old Plans, thereby replacing most of the benefits they lost as well. *See supra* at 10-11. Indeed, as the district court found, it was "not disputed that one of the USWA's primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and that the various components of LTV's follow-on plans, considered together, "*substantially achieved that goal.*" Pet. App. 109a (emphasis added).

II. PBGC ACTED REASONABLY AND WITHIN THE BROAD SCOPE OF ITS AUTHORITY WHEN IT RESTORED THE PLANS BECAUSE THE CIRCUMSTANCES NECESSITATING TERMINATION HAD CHANGED.

The court of appeals acknowledged that financial improvement is a valid basis for restoration. Pet. App. 21a. The court failed to recognize, however, that in section 4047, Congress expressly delegated *to the PBGC* the broad authority to determine *when* restoration for improved financial circumstances—like restoration for other reasons—is "appropriate and consistent with its duties" under Title IV. 29 U.S.C. § 1347. The PBGC's exercise of that authority in this case—restoring the Plans because there was no longer a financial basis for termination—is fully consistent with the provisions and purposes of Title IV and therefore should have been sustained.

Congress gave the PBGC a variety of flexible powers under Title IV so that the agency could effectively address the specialized and varied problems with which it is confronted on a daily basis. The PBGC, for example, has authority to accept or reject the termination date proposed by the plan administrator in a distress termination. 29 U.S.C. § 1348. The agency also has broad discretionary authority to terminate a plan involuntarily "whenever it determines" that a plan has failed to meet the minimum funding standards or that the risk to the PBGC may otherwise increase unreasonably. 29 U.S.C. § 1342(a)(1), (4).

The statute, however, does not favor terminations. When Congress first enacted Title IV of ERISA in 1974, it specifically charged PBGC with the responsibility for "encourag[ing] the continuation and maintenance of voluntary private pension plans for the benefit of their participants." 29 U.S.C. § 1302(a)(1). When it adopted

SEPPAA in 1986, Congress stated that the amendments were intended to limit the ability of employers to transfer their unfunded liabilities to the pension insurance system to "cases of severe hardship" and "to increase the likelihood that full benefits will be paid to participants and beneficiaries." 29 U.S.C. § 1001b(b). More specifically, while Congress required the PBGC to obtain court approval for terminations if the plan administrator does not consent, it granted the PBGC broad power to restore plans without court approval or the administrator's consent. As the district court here held, this makes sense because upon termination participants may suffer benefit reductions, while upon restoration "[t]he immediate effect on participants, whose interests ERISA primarily protects, is either no change or an increase in benefit payments." Pet. App. 89a.

Restoration under section 4047 is simply the reversal of a termination. The PBGC may stop a termination in progress "whenever the corporation determines that a plan which is to be terminated . . . should not be terminated under section 4041 or 4042 as a result of such circumstances as the corporation determines to be relevant." 29 U.S.C. § 1347. Section 4047 authorizes PBGC to restore a terminated plan "to its pretermination status" by transferring control of the plan assets and liabilities back to the employer. And PBGC may restore a terminated plan "if appropriate and consistent" with its statutory duties. *Id.*

Here, PBGC determined that restoration was appropriate because the financial grounds for termination no longer existed. Because termination is generally harmful to workers and retirees, there is every reason to believe Congress would want PBGC to restore a plan if the facts on which a termination was predicated have changed (or have been discovered to be other than as originally thought). Thus, PBGC's determination was fully con-

sistent with Congress's goals of encouraging the continuation of private pension plans, limiting terminations to cases of severe hardship, and increasing the likelihood that full benefits will be paid to plan participants. Unnecessarily restricting restoration, as the court of appeals did here, is inconsistent with those goals.

PBGC terminated the Plans because the Plans had not met ERISA's minimum funding requirements and because the possible long-run loss to the insurance program was expected to increase unreasonably, absent immediate termination. *See* 29 U.S.C. § 1342(a)(1), (a)(4). That decision was based on the Plans' severe underfunding; LTV's statement that it could not and would not fund the Plans; the depressed state of the steel industry, including LTV Steel, that economic experts predicted would not improve; and the increases in the underfunding that were anticipated as a result of projected shutdowns and LTV's cessation of contributions. *See* JA 128-31, 137-40. The PBGC looked at the same factors in considering whether to restore the Plans, and found that each of them had changed. *See supra* at 11-13. PBGC therefore reasonably determined that termination was no longer "appropriate" or "consistent with its duties" under Title IV.

The court of appeals decided, however, that restoration is appropriate only where the PBGC establishes the "long term" ability of a company to fund its plan. Pet. App. 22a, 24a. There is no basis in Title IV for this decision.[21] Title IV does not require the PBGC to review

[21] Indeed, the court of appeals cited nothing in Title IV in support of its decision. Instead, the court relied exclusively on wholly inapposite provisions in Title I of ERISA and IRS regulations. *See* Pet. App. 24a-25a. Contrary to the court's understanding, however, the prohibition in Title I of ERISA against "pay-as-you-go" funding, 29 U.S.C. § 1002(31), does not relate to how long a plan exists.

ongoing plans to determine whether plan sponsors have the "long term" ability to fund the plans; there similarly is no statutory foundation for requiring such an affirmative determination where PBGC decides to restore—*i.e.*, to reverse a termination. PBGC's approach, which looked to whether the predicate for termination continued to exist, is consonant with the function of restoration in the statutory scheme—as a mechanism for "undoing" a termination when changed conditions make termination no longer advisable.

The court apparently adopted its "long-term" ability-to-fund standard because of its concern over "the possibility that the Plans would have to be reterminated." Pet. App. 25a. However, in view of the clear statutory preference for plan continuation, the mere "possibility" of retermination at some future date is an insufficient reason to preclude the PBGC from restoring a plan.

In any event, the court's concern was based on a misunderstanding of the statutory scheme. The court incorrectly assumed that the PBGC would be required to reterminate the Plans involuntarily if, at some future time, LTV were unable to comply with ERISA's minimum funding standards. *See* Pet. App. 25a. PBGC is *required* to terminate a plan, however, only when the plan has insufficient assets to pay benefits "currently due." 29 U.S.C. § 1342(a). It *may* seek to terminate a plan

It simply reflects Congress's concern that plans be reasonably funded for as long as they exist.

There is similarly no basis for the court's reliance on an IRS regulation that the court cited for the proposition that plans must be "permanent." 26 C.F.R. § 1.401-1(b)(2) (1988). That regulation merely provides that for a plan to be tax-qualified, the employer must intend, at the plan's inception, to establish "a permanent as distinguished from a temporary program," and that the plan not be abandoned "for any reason other than business necessity within a few years after it has taken effect." *Id.* These Plans met the tax-qualification requirements in the regulation long ago.

after making a threshold determination that a plan sponsor has missed one or more minimum funding contributions in the past, *id.*, but exercises its discretion to do so only when necessary to protect the insurance program.[22]

By imposing its long-term ability-to-fund requirement, the court interfered with precisely "the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process." *Chenery*, 332 U.S. at 209. The PBGC has been analyzing the financial condition of plans and employers since the agency's inception in 1974, and has determined through this experience that the kind of long-term predictions required by the court's decision simply cannot be made on a reliable basis. In a report prepared for Congress in 1987 after numerous in-depth studies, the PBGC determined, and its outside experts concurred, that predicting when the pension plans of particular companies will terminate is "essentially impossible." PBGC, *Promises at Risk* 43-44, reprinted in *PBGC Proposal to Initiate a Variable Rate Premium System: Hearings Before the Subcomm. on Oversight of the House Committee on Ways and Means*, 100th Cong., 1st Sess. 52 (1987). For this reason, the PBGC recommended against a pension insurance premium based upon a company's ability to fund its plans. *See id.* at 49-57. Congress agreed.

[22] The statutory scheme has flexibility to allow an employer experiencing temporary financial difficulties to continue its pension plans. For example, an employer short of cash may, within certain limits, contribute certain non-cash assets to its pension plans. *See* 29 U.S.C. §§ 1107, 1108(e). An employer may also ask the Internal Revenue Service to waive its minimum funding obligation for a particular year. *See* 26 U.S.C. § 412(d)(1). If the waiver is granted, the amount owed for that year is amortized over the next 15 years. 26 U.S.C. § 412(b)(2)(C), (d)(1), (d)(3). However, before granting a waiver in any case where the amounts owed are large, the IRS is required to consult with the PBGC, and may, as a condition of the waiver, require security that may "be perfected and enforced only by the [PBGC]." 26 U.S.C. § 412(f)(3)(A), (B). The PBGC therefore has substantial experience regarding funding waivers. Thus, contrary to the court of appeals' conclusion (Pet. App. 22a), PBGC's estimate of LTV's 1987 funding obligation, which was premised on the assumption that LTV could receive waivers of 1984-86 contributions, was not unreasonable.

The PBGC's conclusion here thus "rest[ed] squarely in that area where administrative judgments are entitled to the greatest amount of weight by the appellate courts," and should not have been disturbed below. *Chenery*, 332 U.S. at 209; *see Batterton v. Francis*, 432 U.S. at 426. In fact, this case demonstrates the inherent unreliability of long-term predictions of this type. Steel industry experts widely agreed in late 1986 that the industry would continue its then-prevalent downward trend. *See, e.g.*, Oppenheimer & Co., Inc., *Steel—Appropriate Methods of Demand Forecasting* (Nov. 1986), available on NEXIS, Company library, Ind. file. Almost uniformly, they failed to predict the dramatic improvements in the industry that began just a few months later, in early 1987.

While PBGC therefore chose not to apply a "long-term" criterion, PBGC did find that LTV could afford to fund the Plans, at least for the short term, JA 345, 317-18, so there plainly was no danger of immediate retermination.[23] The court of appeals, however, challenged even this finding. Drawing an unnecessary conclusion that could have serious implications for the pension insurance program, the court erroneously stated that the contribu-

[23] In addition, the PBGC knew that, even without additional contributions, the Plans had enough money at the time of restoration to continue paying benefits for at least the immediate future, so that a mandatory involuntary termination under 29 U.S.C. § 1342(a) would not be necessary. *See* AR 1153. Indeed, one of the reasons the PBGC did not restore a fourth LTV pension plan, the Republic Salaried Plan, was because that Plan did not have enough money to pay benefits currently due, *see* JA 316, 318, and even if funded still might not be able to meet current obligations. *Id.* Thus, PBGC was careful not to take the kind of precipitous action that underlay the court's concern about the possibility of retermination.

tions that would be due the Plans would receive "no special priority" in LTV's bankruptcy proceeding. Pet. App. 24a. This conclusion, casually adopted after only minimal discussion, is contrary to all existing case law. *E.g.*, *In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983); *Columbia Packing Co. v. PBGC*, 81 Bankr. 205 (D. Mass. 1988); *In re Robinson Truck Line, Inc.*, 47 Bankr. 631, 637-38 (Bankr. N.D. Miss. 1985).[24] If it is followed, employers will generally be precluded during bankruptcy proceedings from making the periodic contributions to their pension plans that ERISA requires because the contributions would not be treated as "necessary costs" of running the business that are payable on an ongoing basis. *See* 11 U.S.C. § 503(b). Benefit payments, however, must continue to be made from an ongoing plan. Thus, plans that would otherwise continue will have to be terminated because their assets will be depleted, rendering them unable to pay benefits currently due. *See* 29 U.S.C. § 1342(a).

But the court of appeals' erroneous approach has other, even more significant practical consequences. The court's statement that "any claims arising out of LTV's obligation to pay into the pension fund plans are pre-petition debts" (Pet. App. 23a) means that when a plan does terminate, the PBGC, which is normally accorded priority status for at least a portion of its claims for unpaid contributions due the plan, will become merely a general

[24] The court of appeals' citation to *Trustees of the Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 103-04 (2d Cir. 1986), is inapposite. *McFarlin's* addressed the bankruptcy priority of the withdrawal liability owed by an employer to a multiemployer pension plan when it ceases to participate in the plan. Whatever the merits of that decision, it was premised on the notion that the withdrawal liability in that case related to work performed by the company's employees before the filing of the bankruptcy petition, and was therefore a "pre-petition" debt. Contributions payable to an ongoing pension plan during bankruptcy, however, are like wages—they are related to employees' post-petition work, and are therefore entitled to be paid before the claims of general unsecured creditors.

unsecured creditor. Thus, under the court of appeals' conclusion, termination is even less expensive than it otherwise would be, and the incentive to terminate increases accordingly.

Moreover, just as the PBGC would not have been able to prove with any degree of reliability LTV's "long-term" ability to fund the Plans in this case, it will be unable to do so in other cases, particularly in cyclical and volatile industries like steel. As a practical matter, therefore, the court's imposition of its own standard drastically curtails—and perhaps eliminates—Congress's broad delegation of restoration authority to the agency in Section 4047.

III. PBGC WAS NOT REQUIRED TO CONSIDER INCHOATE POLICIES EMANATING FROM BANKRUPTCY AND LABOR LAW IN EXERCISING ITS AUTHORITY UNDER SECTION 4047.

Citing the general rule that an agency must take all relevant factors into consideration, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the court of appeals held that PBGC's restoration decision was arbitrary and capricious because PBGC "focused inordinately on ERISA" and did not adequately consider the policies underlying the bankruptcy and labor laws. Pet. App. 14a-18a. This aspect of the court of appeals' rationale is virtually a caricature of the method of reasoning that should be employed in reviewing agency action under the Administrative Procedure Act and creates a dangerous precedent with far-reaching implications.

At the outset, we note that the court of appeals did not hold that PBGC's decision conflicted with any provision of the bankruptcy or labor laws. Thus it is unnecessary for PBGC to assert that the broad language of section 4047 constitutes an implicit repealer of inconsistent

provisions in other statutes.[25] Nor is this a case in which judicial intervention is necessary to reconcile a direct conflict between two statutes, as in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (NLRB enforcement of National Labor Relations Act "would run directly counter to the express provisions of the Bankruptcy Code"). Moreover, this is not a case in which an agency's action "trench[es] upon the . . . jurisdiction" of another agency, as in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173 (1962).

The court of appeals nevertheless held that bankruptcy and labor law, as well as ERISA, are "involved" and therefore "there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and to the extent possible, honored the policies underlying them." Pet. App. 14a-15a.

Whatever the validity of this technique of judicial review in other contexts, it is inapplicable here by virtue of the plain language of section 4047. This section authorizes PBGC to restore terminated plans in any case in which PBGC determines such action to be "appropriate and consistent with its duties *under this title*," which is Title IV of ERISA. At the very least, this language rebuts the court of appeals' criticism that PBGC's decision was arbitrary because the agency "focused inordinately on ERISA." Pet. App. 14a.

Even without the unique language of section 4047, however, the court of appeals' rationale is an improper basis upon which to hold an agency's decision invalid.

[25] For this reason, the court of appeals' reasoning is not bolstered by its citation (Pet. App. 16a) to the savings clause in section 514(d) of ERISA, 29 U.S.C. § 1144(d), which provides that "[n]othing in this title [Title I of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." In any event, this clause applies by its terms to Title I and section 4047 appears in Title IV of ERISA.

An agency's duties derive from its own enabling act, not from other federal statutes. *Community Television of Southern Calif. v. Gottfried*, 459 U.S. 498, 509-11 & n.17 (1983). Even where an agency is directed to regulate in the "public interest," this Court has held that the agency should take other public policies into account only insofar as they are "directly related" to the agency's own duties. *NAACP v. FPC*, 425 U.S. 662, 670-71 (1976).

There are thousands of statutes in the United States Code, and they could be said to embody countless policies. If an agency's decision can be invalidated whenever a reviewing court can point to an arguably relevant statutory policy that was not considered, then no decision is immune from judicial remand. Here, for example, the court of appeals might also have faulted the PBGC for failing to consider the implications of the policies underlying the antitrust or foreign trade laws.

An additional flaw in the court of appeals' reasoning is the court's assumption that agencies must give effect to the "policies and goals" of other statutes (Pet. App. 17a) apart from what the statutes actually provide by their terms. As this Court recently observed:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original) (per curiam). *Accord Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). This flawed approach is particularly harmful when the court attempts to discern simplistic

policies emanating from complex statutes such as the Bankruptcy Code or the National Labor Relations Act.

For example, the court of appeals cited 11 U.S.C. § 362, the "automatic stay" provision in the Bankruptcy Code, for the general proposition that bankruptcy is intended to shield a debtor from the financial pressures imposed by its creditors and to promote an equitable distribution of the debtor's assets. Pet. App. 15a (citing *Bildisco*, 465 U.S. at 528). This Court, however, has recognized in the context of section 362 that the Bankruptcy Code does not give a debtor "*carte blanche* to ignore non-bankruptcy law." *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986). As the Court stated, "If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'" *Id.* at 501 (quoting *Swarts v. Hammer*, 194 U.S. 441, 444 (1904)). Certainly no clear intent can be derived from the general proposition cited by the court of appeals. Moreover, section 362 was clearly irrelevant in this case because, as both the court of appeals and the district court recognized, restoration is a governmental regulatory action exempted by 11 U.S.C. § 362(b)(4) from the automatic stay. Pet. App. 24a, 73a-81a.

The court of appeals also cited section 1113 of the Bankruptcy Code as "encourag[ing] collective bargaining for debtors in reorganization," including collective bargaining over pensions. Pet. App. 16a, 18a. Similarly, the court cited this Court's decision in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981), for the proposition that "[a] fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace . . . [and] [c]entral to achievement of this purpose is the promotion of collective

bargaining." Pet. App. 15a-16a. No one would dispute these propositions. They in no way suggest, however, that the fruits of collective bargaining are therefore insulated from the constraints of applicable law. Nothing in labor law or "policy" requires the government to subsidize a product of private collective bargaining that contravenes national pension policy. That is, however, the direct effect of the court of appeals' decision.

The PBGC did not interfere with private collective bargaining in this case. To the contrary, application of the PBGC's follow-on policy merely operated to withdraw PBGC's guarantee and thus to deny a PBGC subsidy for LTV's ongoing pension program. Withdrawal of that subsidy certainly may force the bargaining parties to reassess their priorities, but, as this Court has held, "The terms of any collective-bargaining agreement must comply with federal laws." *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982). *See also Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

In any event, Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws, making it unnecessary—and inappropriate—for the court of appeals to examine the policies and goals of those statutes to create its own harmonizing principles. For example, Congress provided that an employer in bankruptcy reorganization may be able to terminate an underfunded pension plan in a distress termination if it can demonstrate to the bankruptcy court that it will not otherwise be able to reorganize. *See* 29 U.S.C. § 1341(c)(2)(B)(ii).[26] Congress wove bankruptcy considerations into

[26] The legislative history reflects that, in fashioning this test, Congress "tried to balance the need to limit access to the insurance system to cases of genuine need against the danger of making the tests so stringent that nothing short of total liquidation would qualify for PBGC assistance." H.R. Rep. No. 241, 99th Cong., 1st Sess., pt. 2, at 49 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 707.

other provisions of Title IV as well. *E.g.*, 29 U.S.C. §§ 1342(e), 1362(e)(1)(B)(ii), 1368(c)(2). Congress also incorporated labor law concerns into Title IV by providing that an employer may not terminate a pension plan voluntarily "if the termination would violate the terms and conditions of an existing collective bargaining agreement." 29 U.S.C. § 1341(a)(3).

In view of the plain language of section 4047, PBGC properly focused on Title IV of ERISA in deciding to restore LTV's Plans. The court of appeals erred in requiring PBGC to consider the "policies and goals" of other statutes, particularly where, as here, PBGC's action did not conflict with any provision of those other statutes, and Congress itself has already harmonized the provisions of Title IV with these other laws. A requirement that an administrative agency "balance" or "accommodate" every other statute whose general policy is arguably relevant would cripple the administrative process and provide the courts with unfettered freedom to substitute their policy views for those of the agency charged by Congress with the responsibility for making such judgments.

IV. PBGC PROPERLY DETERMINED THE INFORMAL PROCEDURES APPLICABLE TO RESTORATION.

In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), this Court made clear that where the due process clause is not implicated and an agency's governing statute contains no specific procedural mandates, the Administrative Procedure Act establishes the maximum procedural requirements a reviewing court can impose on agency rulemaking. *Id.* at 524. As the Court stated, "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Id.* Thus, this Court "has for more than four decades emphasized that the formulation of procedures [is] basically to be left within

the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgment." *Id.*

The same principles should apply to the PBGC's informal adjudication in this case. It is undisputed that PBGC was entitled to proceed by informal adjudication and that the APA does not impose any procedural requirements applicable to the informal adjudication in this case. Moreover, as the court of appeals acknowledged, section 4047 "does not discuss the procedures that are to be followed by PBGC when reaching a restoration decision." Pet. App. 26a. Equally important, no protected liberty or property right was implicated by the restoration decision; none was asserted by LTV, and none was identified by the court. PBGC's restoration decision merely reinstated pension obligations that LTV itself had freely undertaken and of which it had no right to be relieved.[27]

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[27] Although the court of appeals did not say so explicitly, its invocation of "principle[s] of fundamental fairness" suggests that due process was in fact the basis for the court's holding that PBGC's procedures were insufficient. *See* Pet. App. 26a. However, the requirements of procedural due process apply only to the deprivation of rights or interests encompassed by the fifth and fourteenth amendments. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). This Court has emphasized that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. *Accord Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement," grounded in state or federal law, "which cannot be removed except 'for cause' ") (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)).

In this case, restoration, like termination, resulted from the PBGC's exercise of discretionary authority under Title IV of ERISA. The PBGC terminated the Plans to preserve the integrity of the pension insurance program for the benefit of the retirees it serves, not because LTV had any right to termination. And al-

In any event, the PBGC properly exercised its procedural discretion in this case. Its procedures, while informal, were thorough and fair. PBGC made LTV fully aware of its objections to the follow-on plans. It repeatedly gave LTV the opportunity to present its side of the dispute or work out other arrangements, and advised LTV that restoration was under consideration. LTV cannot claim otherwise. Indeed, at the time the follow-on plans were negotiated, LTV and the USWA included a provision in the collective bargaining agreement that allowed either side to invalidate the agreement if PBGC took action "to reinstate LTV Steel's pension liabilities." JA 155.

PBGC first identified abusive follow-on plans as a potential basis for restoration in its published 1981 and 1986 opinion letters. *See supra* at 7-8; Pet. App. 159a, 172a. PBGC advised LTV explicitly that its proposed follow-on plans violated the agency's policy as soon as the plans were first tentatively negotiated in May 1987. JA 230. On July 1, 1987, 21 Senators and Representatives asked PBGC to "withhold any administrative or legal action" with respect to LTV's follow-on plans until they met with the Executive Director of PBGC to discuss the matter. JA 147. The Executive Director and representatives of the PBGC, LTV, and the USWA met with the members of Congress on July 9, 1987. JA 149. The PBGC then had lengthy meetings with LTV and union representatives on July 10 and 13, 1987, to discuss the follow-on plans. JA 262-67, 348. In these meetings, the PBGC advised LTV and the union of alternative arrangements they could adopt to provide relief to retirees and employees without running afoul of ERISA.[28]

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though LTV may have had a "need or desire" or a "unilateral expectation" that the Plans remain terminated, it clearly had no *entitlement* to it. *See Roth*, 408 U.S. at 577.

[28] PBGC told LTV and the union that it would not object to the establishment of a defined contribution plan for active workers that provided benefits on the basis of employees' post-termination service, and that benefits lost by retirees could be satisfied to the extent permitted by Section 4049 of ERISA, 29 U.S.C. § 1349. JA 262-67.

When LTV nevertheless sought bankruptcy court approval to fund the follow-on plans, PBGC's Executive Director and another senior agency official submitted detailed affidavits to the bankruptcy court, explaining again the PBGC's objections to the plans. JA 226-37. At the hearing on July 16, 1987, LTV cross-examined the Executive Director about these objections. AR 592-604. In addition, PBGC officials corresponded extensively with LTV's Chief Executive Officer and its Chief Financial Officer, and the agency repeatedly warned LTV that restoration of the terminated Plans was an option if LTV refused to abandon its abusive follow-on plans. JA 262-67, 330-42, 348. Thus, on August 31, 1987, PBGC's Principal Deputy Executive Director wrote to LTV's CEO Raymond Hay that "one of several options under review at the Agency is 'Restoration' of the plans pursuant to Section 4047 of [ERISA]." JA 330. PBGC again warned LTV that restoration was being considered in a letter dated September 14, 1987. JA 338. Mr. Hay acknowledged this in a letter dated September 10, 1987. JA 336.

LTV likewise had full knowledge that its financial condition was implicated in the restoration proceedings. As noted above at page 22, the legislative history specifically identifies a "favorable reversal of business trends" as a sufficient basis for restoration. H.R. Conf. Rep. No. 1280 at 378, *reprinted* in 1974 U.S. Code Cong. & Admin. News at 5157. The termination of LTV's Plans, to which LTV had consented, was based solely on financial considerations, including LTV's own representations about its ability to fund the Plans. *See supra* at 9. In September 1987, aware that PBGC was considering restoration, LTV CEO Hay wrote to PBGC urging that the Plans not be restored because "[a]bsolutely nothing has occurred to alter" the financial grounds on which the

Plans were terminated. JA 337. He further argued that "[i]f the plans were to be restored, the ultimate reorganization of the company would be jeopardized and the interests of retirees, employees, creditors and shareholders would be adversely affected." *Id.*

The PBGC, however, relied on the specific data set forth in LTV's Forms 10-K and 10-Q filed with the SEC. AR 671-1084. The PBGC also reviewed a report of LTV's Creditors' Committee, which was based on data provided by LTV. AR 15-98; JA 317. The Forms 10-K and 10-Q must be accurate and must include all data material to LTV's financial condition. 15 U.S.C. §§ 78m(a), 78f(f); SEC Rule 12b-20, 17 C.F.R. § 240.-12b-20 (1988). And LTV has a fiduciary obligation to supply accurate and complete financial information to its creditors. 11 U.S.C. § 1107 (incorporating 11 U.S.C. §§ 1106(a)(1), 704(7), 704(8)). Accordingly, LTV cannot complain that the PBGC relied on incorrect data or that anything material was not considered.

Moreover, the PBGC accorded LTV numerous opportunities to rebut the factual bases for restoration. In addition to the numerous meetings cited above and the proceedings in the bankruptcy court, PBGC's Executive Director informed LTV on September 18, 1987, that the PBGC would "be happy to consider any additional information [LTV] might wish to supply." JA 348. To that end, she offered to send her principal deputy to LTV's headquarters in Dallas to review any such information. JA 348-49. Instead, LTV representatives came to Washington, where the parties met on September 19 and 21. JA 356-57, 360-61. At both meetings, the PBGC pressed LTV for additional information bearing on the effect of restoration on interested parties. *Id.* LTV speculated that restoration could jeopardize an impending contract with Honda of America; that the steel industry was very sensitive to upset; that a strike could cost the company $100 million a month; and that the company could owe as

much as $300 million in past due contributions if the plans were restored, for which it would be hard-pressed to come up with collateral for pension funding waivers. JA 357, 360. LTV then indicated that the effect of restoration would be unclear. JA 360. It did not, however, offer any details to support these claims or ask for additional time to submit any. JA 356.

In view of all the above, LTV cannot seriously claim that it was surprised when the PBGC restored the Plans on September 22, 1987. Nor can LTV claim that it was surprised by the reasons given for the restoration, or that it was prejudiced by the PBGC's procedures.

Moreover, PBGC had a pressing need for prompt action in this case, both to correct LTV's abuse of the pension insurance program and to prevent other companies from following LTV's example.[29] LTV first informed PBGC of the proposed follow-on plans in May, sought and obtained bankruptcy court approval to fund them in July, and implemented them in August. To require more elaborate procedures in circumstances such as these would unduly restrict PBGC's restoration authority.

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[29] Prompt action was also in LTV's interest. Once its Plans were restored to their "pretermination" status pursuant to section 4047, the follow-on payments were unnecessary. Amounts already paid, however, would likely have been unrecoverable.

CONCLUSION

The decision of the court of appeals should be reversed and PBGC's restoration of the Plans should be enforced.

Respectfully submitted,

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Dated: December 14, 1989

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No. 89-390

In The
Supreme Court of the United States

October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

BRIEF OF RESPONDENTS DAVID H. MILLER AND WILLIAM W. SHAFFER

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STATEMENT OF THE CASE

Respondents Miller and Shaffer are participants in the Jones and Laughlin Retirement Plan ("J&L Salaried Plan"). The J&L Salaried Plan is a defined benefit plan exclusively for salaried employees. 5 Ex. J.A. 1300-76.[1] Benefits payable by the plan are for service by salaried employees through December 31, 1985. 5 Ex. J.A. 1300-76. On that date the J&L Salaried Plan was frozen and a replacement defined contribution plan was instituted for all future service of active salaried employees. 5 Ex. J.A. 1300-76.

The J&L Salaried Plan differs from the two hourly plans in certain significant respects. First, the J&L Salaried Plan is not a product of collective bargaining with a labor organization. The benefits payable to salaried employees are not accorded protection by § 1113 of the Bankruptcy Code.[2] Secondly the J&L Salaried Plan has, in addition to three debtor entities, contributing sponsors which are not presently in reorganization nor in bankruptcy. 4 Ex. J.A. 705; 5 Ex. J.A. 1310. Funds and assets of these entities are not part of the debtors estate nor encumbered by the constraints of a debtor in possession.

As with the two hourly plans, the J&L Salaried Plan was involuntarily terminated on January 13, 1987. 6 Ex. J.A. 1539-41. Subsequent to the termination of the plans, LTV established follow-on plans for each of the terminated

[1] References to Ex. J.A. are to the eight volumes of Exhibits to the Joint Appendix filed in the Court of Appeals. These volumes are the PBGC's administrative record.

[2] 11 U.S.C. § 1113 codifies P.L. 98-353, Title III, Subtitle J, § 541(a), 98 Stat. 390 which became effective July 10, 1984 and is applicable to all cases filed under Title 11 of the United States Code commenced after that date. § 1113 will be used for ease of reference.

plans. The PBGC on September 22, 1987, notified LTV Corporation and LTV Steel Company ("LTV") that the J&L Salaried Plan was restored effective January 13, 1987. 6 Ex. J.A. 1578.

The J&L Salaried Plan is the least underfunded of the three plans. The J&L Salaried Plan represents only about 16% of the total underfunding for all three restored pension plans. 5 Ex. J.A. 1153. The J&L Salaried Plan had assets of $260 million and monthly benefit payment obligations of $5 million, if full promised pension benefits were paid to eligible participants. The J&L Salaried Plan required the least annual contributions to comply with minimum funding requirements of ERISA. 5 Ex. J.A. 1153. For 1986 the minimum funding contributions required upon restoration are $25 million, with annual funding thereafter remaining at or about that amount, except that the contribution in 1987 would have been $30 to $35 million for the J&L Salaried Plan if waivers were obtained for the 1984 and 1985 plan years. 1B Ex. J.A. 188-89.

Prior to the restoration notice but after termination, the debtor entities experienced a substantial reversal in business trends resulting in financial gains fully capable of funding the J&L Salaried Plan. LTV's 1987-88 Operating Plan estimated LTV Steel's net income in 1987 and 1988 to be $238 million and $260 million respectively. 1A Ex. J.A. 12. Operating income was projected at $268 million for 1987 1A Ex. J.A. 12-13. LTV Steel's actual performance for the period from January through May 1987 resulted in actual operating income of $163.7 million, $44.9 million above that projected in the Operating Plan. 1A Ex. J.A. 12. LTV Steel's net income of $162.1 million

for the same period exceeded projections by $34.3 million. 4 Ex. J.A. 1036.

In addition to the debtor contributing sponsors, non-debtor contributing sponsors also reported positive operating income for January through May 1987. 1B Ex. J.A. 59. This operating income was not used to make contributions to the J&L Salaried Plan even though four contributing sponsors were not in bankruptcy.

After LTV refused to comply with the restoration notice, the PBGC commenced an enforcement action against LTV. The PBGC filed a motion for summary judgment, which was denied by the district court. *In re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988).

The Court of Appeals affirmed the district court's decision to deny summary judgment to the PBGC. As did the district court, the court of appeals did not consider the merits of restoring any individual plan but rather viewed all three plans collectively.

In evaluating the articulated reasons for restoring the J&L Salaried Plan the court of appeals reasoned that Miller and Shaffer should not be heard to complain that the establishment of the follow-on plans was an abuse of the pension insurance system because Miller and Shaffer received higher benefits than PBGC guaranteed levels. *PBGC v. LTV Corporation*, 875 F.2d 1008, 1018 (2d Cir. 1989).

The court of appeals also concluded that although improved financial circumstances is a basis for restoration, the administrative record did not support PBGC's finding that LTV's financial circumstances had justified restoration. The court faulted the PBGC for emphasizing LTV's short term economic condition and failing to assess the

possibility that the plans would have be to reterminated at some point in the future even though LTV may have been able to fund all three plans for a limited period of time. *Id.* at 1018-1020.

SUMMARY OF ARGUMENT

Respondents Miller and Shaffer maintain that the PBGC properly restored the J&L Salaried Plan. To the extent the PBGC's brief pertains to the J&L Salaried Plan, Miller and Shaffer endorse the arguments advanced by the PBGC. Miller and Shaffer write separately to emphasize matters particular to J&L Salaried Plan.

The J&L Plan, of which Miller and Shaffer are participants, was properly restored. Neither court below independently examined whether the financial details in the administrative record substantiated restoration of the J&L Salaried Plan. Had the courts done so, it would have been seen readily that LTV Steel and non-debtor contributing sponsors could meet the minimum funding standards to continue the J&L Salaried Plan in a restored status.

The power of the PBGC to restore a pension plan is not restrained by a requirement to prove that the employer has the long term financial wherewithal to preclude the possibility that retermination will be necessary at some unknown date in the future. Instead, the PBGC may restore a plan whenever the PBGC determines that restoration is appropriate and consistent with its duties under Title IV of ERISA. The court below erred in holding that the PBGC must determine the long term financial prognosis for the employer's financial health before it could restore a pension plan. Congress did not encumber the PBGC with such an extreme evidentiary burden.

Absent Congressional guidelines, attention to other provisions of Title IV is essential to discern the proper result. Title IV places evidentiary burdens associated with voluntary termination of pension plans upon the employer not the PBGC. Once the PBGC determined that the factors counseling termination were no longer operative and that the employer had the financial resources to meet minimum funding requirements, PBGC honored the Congressional intent underlying ERISA as well as the PBGC's duties under Title IV of ERISA in issuing its restoration notice.

ARGUMENT

I. The J&L Salaried Plan is by Statute a Distinct Entity And The Restoration of That Plan Should Have Been Separately Evaluated

The court of appeals, as did the district court, erred by failing to consider whether restoration of each individual plan was proper. Having neglected significant differences between the J&L Salaried Plan and the two hourly plans, the court of appeals failed to properly evaluate whether the PBGC reasonably could conclude that the establishment of the follow-on plan for salaried participants was an abuse of the pension insurance system. Equally true, the court of appeals perpetuated an error in the district court's evaluation of whether the PBGC's financial analysis substantiated restoration of the J&L Salaried Plan, even if all three plans could not have been restored on September 22, 1987.

The J&L Salaried Plan is a separate distinct defined benefit plan. Plan documents of the plan pertain only to the pension program for salaried employees. 5 Ex. J.A. 1300-76. The two hourly plans restored on September 22,

1987 are bargained for agreements which have no relationship to the J&L Salaried Plan. *See e.g.* 29 U.S.C. § 1102(1). The assets of the J&L Salaried Plan are used to fund benefit payments only to participants in that plan. 29 U.S.C. § 1103(c)(1). In addition, by statute a pension plan is a distinct entity. *See* 29 U.S.C. § 1132(d). Although the Notice of Restoration applied to three pension plans, a single announcement of PBGC's decisions should not have evolved into disregard for the required individual consideration of each pension plan.

The financial analysis in the administrative record plainly supports the PBGC's conclusion that the plan sponsors could maintain the J&L Salaried Plan in a restored status. The J&L Salaried Plan requires only $25 million per year to meet minimum funding requirements. LTV Steel alone had operating income well in excess of that amount in the first six months of 1987 alone. 1A Ex. J.A. 12. Non-debtor contributing sponsors also had a net operating income during that same period. 1B Ex. J.A. 59.[3]

PBGC estimated that 20% of the $90 million funding for the three follow-on plans was money allocated to pay salaried participants of the J&L Plan. If this $18 million were applied to minimum annual contributions rather than the follow-on plan, the plan sponsors need add only another $7 million to fully meet the minimum funding requirements of the J&L Salaried Plan.

Neither court correctly considered the separate status of the three plans and thus erroneously concluded that the administrative record did support the restoration of the J&L Plan.

[3]The presence of non-debtor contributing sponsors is one significant difference ignored by the courts.

II. The Establishment of the Salaried Follow-On Plan Was An Abuse of the Pension Insurance System

While the legislative history of § 4047, 29 U.S.C. § 1347,[4] indicates that improvement in financial circumstances is one appropriate reason for restoration, H. R. Conf. Rep. No. 1280, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58, the statutory language of Section 4047 is more expansive. The PBGC is empowered by Congress to restore to pretermination status a terminated single employer pension plan

> "in any such case in which the [PBGC] determines such action to be appropriate and consistent with its duties. . . . " 29 U.S.C. § 1347.

Section 4002, 29 U.S.C. § 1302(a)(1)-(3) articulates the duties of the PBGC under Title IV of ERISA. Section 4002 demands that the PBGC

> (1) . . . encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> (2) . . . provide for the timely and uninterrupted payment of pension benefits to participants . . . . and
>
> (3) . . . maintain premiums established by the corporation under § 4006 at the lowest level consistent with carrying out its obligations under this Title.

29 U.S.C. § 1302(a)(1)-(3).

[4]ERISA was amended by the Siegler-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986) and again in 1987 by the Pension Protection Act, Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987). References herein to ERISA are to the statute as amended in 1986, as found in 29 U.S.C. (1982 and Supp. IV 1986).

On September 22, 1987, the PBGC issued to LTV a Notice of Restoration informing that three pension plans, including the J&L Salaried Plan, were "restored, effective immediately, to their pretermination status as of January 12, 1987."[5] 6 Ex. J.A. 1578. The restoration decision was premised on three factors articulated in the Notice: "LTV Steel's establishment, after the termination of the Plans, of a retirement program that results in an abuse of the pension plan termination insurance system established by Title IV of ERISA; LTV Steel's improved financial circumstances; and LTV Steel's demonstrated willingness to fund employee retirement arrangements." 6 Ex. J.A. 1578. The PBGC's restoration of the J&L Salaried Plan was wholly consistent with not only the letter but the spirit of the PBGC's legislatively mandated duties articulated in Section 4002 of Title IV of ERISA, 29 U.S.C. § 1302.

Upon termination of the J&L Salaried Plan in January 1987, the PBGC assumed LTV's obligations to fund the guaranteed portion of benefits payable under the plan. Relieved of this cost of doing business, LTV established the follow-on plan which in large measure provides benefits promised under the terminated plan but not guaranteed or paid by the pension insurance system administered by PBGC.

The purposes of Title IV are undermined if LTV is free to shift its pension obligations to the PBGC and then rely on PBGC guaranteed benefit payments to comprise a sizeable portion of a replacement pension program. To permit LTV to restructure pension obligations with the insurance pool as the bedrock of the program escalates premium costs and destroys the incentive for other

[5]A fourth pension plan, Pension Plan of Republic Steel Corporation, was not restored. 3 Ex. J.A. 644.

employers to continue voluntary private pension plans guaranteed by ERISA. The PBGC's conclusions were not implausible, *see Sierra Club v. United States Army Corps of Engineers*, 772 F.2d 1043, 1051 (2d Cir. 1985), and the court of appeals should not have substituted its judgment for that of the PBGC. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The court of appeals, however, reasoned that because the establishment of the follow-on plans was a product of bargaining under § 1113 of the Bankruptcy Code and in settlement of a lawsuit commenced by the United Steelworkers of America, follow-on plans could not be considered abusive of the pension insurance system. While this reasoning might be correct as applied to the two hourly pension plans, the reasoning is seriously flawed as applied to the J&L Salaried Plan.

The Court of Appeals held that Miller and Shaffer could not be heard to complain because they derived benefit from the follow-on plan. The reasoning misapprehends the argument advanced by Miller and Shaffer.

Miller and Shaffer argued that the district court's reasoning—that the follow-on plans were not abusive of the pension insurance system because the product of mandatory bargaining and settlement of litigation—was not applicable to the follow-on plan established for salaried employees. The court of appeals attributed to Miller and Shaffer a position with respect to all three follow-on plans when Miller and Shaffer specifically limited their argument to the J&L Salaried Plan. Miller and Shaffer Brief at 7-8. Again before this Court, Miller and Shaffer limit their position to the plan in which they are participants, the J&L Salaried Plan.

A restored J&L Salaried Plan immediately reinstitutes the safeguards of ERISA and entitles Miller and Shaffer to ongoing full promised benefits as well as payment of benefits already unpaid by reason of the plan termination. Plainly, plan participants would much prefer to once again be cloaked with the protections of ERISA rather than rely on the uncertain generosity of a bankrupt employer.

The follow-on plan for salaried participants of the J&L Salaried Plan was voluntarily established by LTV. Although § 1113 of the bankruptcy code required collective bargaining with union representatives over the hourly plans, LTV's action with respect to salaried employees was not mandated. The follow-on plan provisions, 4 Ex. J.A. 1085-89, restored substantial nonguaranteed benefit amounts, relying upon termination insurance to subsidize the base amount salaried participants would receive. Absent any bankruptcy provision requiring negotiation over the lost benefits, the PBGC reasonably could conclude that as to the J&L Salaried Plan, the establishment of a follow-on plan not only was evidence of LTV Steel's willingness to fund employee retirement arrangements, but was an abuse of the pension termination insurance system.

III. The Plan Sponsors Must Bear the Burden of Demonstrating Financial Inability to Maintain a Pension Plan

The court of appeals imposed upon the PBGC the burden to prove that plan sponsors would have the long-term financial ability to meet funding obligations and avoid retermination. Neither § 4047 of ERISA nor the legislative history convey that Congress intended the PBGC to maintain a plan in a terminated status until it could demonstrate a plan sponsor's ability to maintain a

pension plan. Equally true, neither § 4047 nor the legislative history address this issue. However, Title IV, viewed in its entirety, evidences a balancing of burdens which counsels that the plan sponsors, not the PBGC and plan participants, must bear the financial burden during periods of uncertainty.

Section 4047 delegates the authority and the responsibility to the PBGC to determine when it is appropriate to restore a terminated pension plan. Section 4042, 29 U.S.C. § 1342, limits this discretion by mandating that an active plan be involuntarily terminated when the plan cannot meet benefit payments when due. Logic dictates that a terminated plan cannot be restored if it must by virtue of § 4042 immediately be involuntarily terminated. However, for a plan with sufficient assets to meet monthly benefit payments, the PBGC exercises discretion guided by its duties under Title IV.

Plan sponsors unable to continue a pension plan have available recourse under distress termination provisions. Section 4041(c) permits plan sponsors to seek termination of a pension plan when continuing to honor those pension promises creates what Congress determined to be unduly burdensome financial obligations. *See* Section 4041(c), 29 U.S.C. § 1341(c). The burden of establishing that the distress criteria is that of the plan sponsor, not the PBGC or plan participants.

These termination provisions represent a Congressional balancing of interests among the PBGC, plan participants and plan sponsors. This balance was reached because

> "Congress wanted to correct this condition [loss of anticipated benefits] by making sure that if a worker

has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980).

Restoration under Section 4047 is informed by this Congressional balancing of interests. The PBGC's exercise of its restoration authority, guided by its Title IV duties, should retain the Congressional balance by continuing to demand that plan sponsors demonstrate that the distress criteria would dictate termination.

The court of appeals' insistence that the PBGC evaluate and determine that retermination will not occur in the future reverses the Congressional scheme set forth in Title IV.[6] Even though the J&L Salaried Plan could have been maintained after restoration for an indefinite period, the court of appeals demanded certainty from the PBGC. By imposing the substantial evidentiary burden on the PBGC, the court of appeals implicitly mandated that retirees bear the financial loss even though termination was not mandatory under Section 4042 or necessary under 4041(c). Relegating the plan participants to a position subservient to the plan sponsors during these periods contravenes the central purpose of ERISA.

[6]The J&L Salaried Plan had $260 million dollars in assets and monthly benefit payment obligations of only $5.0 million. 5 Ex. J.A. 1153. Involuntary termination under § 4042 was not mandatory as the J&L Salaried Plan could easily meet payment obligations for more than four years.

CONCLUSION

The decision of the Court of Appeals should be reversed with direction to enter judgment for the PBGC as to the J&L Salaried Plan.

Respectfully submitted

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QUESTIONS PRESENTED

The only real question presented to this Court is whether this Court should remand this case to the United States District Court for an evidentiary hearing regarding whether LTV Steel Company, Inc. can afford restoration of the pension plans in question.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-390

PENSION BENEFIT GUARANTY CORPORATION,

PETITIONER

v.

LTV CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT BANCTEXAS DALLAS, N.A.

STATEMENT OF THE CASE

The statement of the case is accurately presented by the Pension Benefit Guaranty Corporation in its brief.

SUMMARY OF ARGUMENT

This case concerns the Pension Benefit Guaranty Corporation's ("PBGC") efforts to reinstate pension plans of LTV Steel Company, Inc. ("LTV Steel") which were improvidently terminated. The District Court ruled that reinstatement of these improvidently terminated pension plans was appropriate if the PBGC could demonstrate, by providing a sufficient administrative record, that the plans would not be inevitably re-terminated. The District Court further ruled that the PBGC had not provided a sufficient administrative record to demonstrate the affordability of the pension plans

by LTV Steel. On appeal the Second Circuit affirmed in all respects the District Court's decision, 875 F.2d 1008.

BancTexas maintains that the PBGC had the right to restore the pension plans in question if such restoration will not inevitably result in retermination of the effected pensions plans. Thus, BancTexas Dallas, N.A. ("BancTexas") believes that the Second Circuit's decision should be affirmed and this case remanded to the District Court. At the District Court, the PBGC can quickly and easily supplement its administrative record by presenting evidence to the District Court to demonstrate that restoration of the terminated pension plans pursuant to Section 4047 of The Employee Retirement Income Security Act of 1974, as amended ("ERISA") was appropriate, that LTV Steel can afford the restored plans, and that subsequent retermination is not inevitable.

ARGUMENT AND AUTHORITIES

The PBGC posited two theories for restoration of the pension plans. First, the PBGC contended that utilization of a follow-on plan constituted a substantial abuse and justified restoration. The PBGC has fully elaborated on this theory in its brief.

Second, the PBGC concluded that restoration was warranted because the fortunes of LTV Steel had improved to the point where LTV Steel could now afford to make the required payments if the pension plans were restored. This "affordability" theory is also discussed by the PBGC in its brief. The District Court ruled, and the Second Circuit affirmed, that the PBGC could not prevail on its "abuse" theory because it was legally and factually unsound.

Likewise, the Second Circuit affirmed the District Court's finding that although the administrative record of the PBGC was not complete enough to support its affordability theory, if the PBGC could supplement its administrative record to demonstrate affordability, restoration of the pension plans was proper pursuant to Section 4047 of ERISA. (875 F.2d 1008 at pg. 1020.)

The PBGC cannot prevail under either its abuse theory or its affordability theory unless it demonstrates that restoration of the pension plans will not inevitably lead to retermination and that LTV Steel can afford to service the restored pension plans. In order to prevail under its "abuse" theory, the PBGC must establish additional factors, including the inherent legal viability of the theory. Devotion of this Court's time to this academic question of "abuse" is an exercise in redundancy since restoration of the pension plans is appropriate if affordability is established and "abuse" cannot be established absent affordability.

BancTexas fails to understand why the PBGC does not simply present competent evidence directly to the District Court in support of its affordability theory.* Everyone, including the PBGC, agrees that it would be improper for the PBGC to restore the pension plans if retermination of the pension plans is inevitable. Consequently, in order to act appropriately under Section 4047 of ERISA, the PBGC must be able to demonstrate that it is reasonably likely that the pension plans will not require retermination in the near future. Both the District Court and Second Circuit's opinion give the PBGC the opportunity to make such a determination either directly to the District Court or through an administrative process which will subsequently be reviewed by the District Court under an arbitrary and capricious standard.

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* Perhaps the PBGC's approach, and its current financial plight, can be attributed to the fact that the PBGC was modeled after the now defunct Federal Savings and Loan Insurance Corporation. See FN4 and text accompanying FN5, pgs. 3 and 4 of the PBGC Brief.

Instead of wasting this Court's time attempting to establish its abuse theory, the PBGC should present evidence directly to the District Court since it cannot prevail under either an abuse theory or an affordability theory unless it can establish affordability.

While the media has widely reported the District Court and Second Circuit's opinions as a victory for LTV Steel, BancTexas believes that ultimately the ruling is more beneficial to the PBGC since the ruling established the PBGC's right to reinstate the pension plans upon a simple showing that the fortunes of LTV Steel have improved to the point where LTV Steel can now afford to fund the reinstated plans. Mechanisms exist under the Bankruptcy Code which will allow the available cash flow of LTV Steel to be utilized to fund reinstated pension plans.

The Chapter 11 case of LTV Steel has been pending since June of 1986. For reasons which remain unarticulated, the PBGC has failed to supplement its administrative record regarding the restoration of the pension plans in question. In the meantime, creditors and other parties-in-interest have been stymied in their attempts to reorganize LTV Steel and its affiliates, including The LTV Corporation ("LTV"). Although some further delay is inevitable, neither the Bankruptcy Code nor ERISA contemplates protracted administrative review which will further delay the reorganization of LTV Steel and LTV. The PBGC has admitted its inability and unwillingness to balance the competing policies of the Bankruptcy Code and ERISA. PBGC Brief, Part III. To the extent possible, further delay should be avoided. Under these circumstances, further development of an administrative record by the PBGC would be superfluous since such action will be inevitably reviewed by the District Court which can and will balance the appropriate competing statutory policies. *See Midlantic National Bank v. New Jersey*

Department of Evironmental Protection, 474 U.S. 494 (1986). The rights of all the parties, including the PBGC, LTV Steel, LTV and their respective creditors and other parties-in-interest will be best served by a direct presentation by the PBGC to the District Court of its evidence regarding affordability. No provision of ERISA prohibits such a procedure. Accordingly, the decision of the Second Circuit should be affirmed and this case should be remanded to the District Court for an evidentiary determination of the affordability issue.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, BancTexas respectfully prays that this Court affirm in all respects the Second Circuit's decision of May 12, 1989, and remand this case to the District Court for an evidentiary hearing on the issue of affordability.

RESPECTFULLY SUBMITTED,

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No. 89-390 (18)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,

Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER AND WILLIAM W. SHAFFER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES

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January 16, 1990

59 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals properly find that the decision of the Pension Benefit Guaranty Corporation (the "PBGC") to restore three involuntarily terminated pension plans sponsored by LTV Steel Company, Inc. was arbitrary and capricious because it failed to consider properly the affordability and viability of the restored plans, and was unsupported by the administrative record below?

2. Did the Court of Appeals properly find that the restoration decision of the PBGC was arbitrary and capricious because it failed to give adequate consideration to the bankruptcy and labor law implications of its decision?

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES

STATEMENT OF THE CASE

LTV's Bankruptcy

On July 17, 1986, The LTV Corporation ("Parent"), LTV Steel Company, Inc. ("LTV Steel") and substantially all of their affiliates (Parent, LTV Steel and their affiliates, collectively "LTV") filed petitions for reorganization under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). At that time, LTV Steel was the second largest steel company in the United States, having been created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation. However, the pressures of surviving in an industry battered by foreign competition proved too much, and by 1986 LTV was suffering from record losses in the steel business, a weak dollar, declining steel shipments and the tightening of its credit. It was faced with impending defaults under its credit agreements, and its bank lines had been terminated.

At the time it filed its Chapter 11 petitions, LTV was burdened by massive pension and other obligations. Each of LTV Steel's predecessor companies had brought its pension and other obligations to the merged entity. To reduce costs and improve efficiency, LTV Steel had shut down extraneous facilities, thereby triggering additional obligations to those employees who were laid off. As a result, LTV Steel's growing pension and retiree health liabilities rested on an ever shrinking base. By 1986, LTV Steel's operations employed 24,544 active workers but supported 77,182 retirees, more than three retirees for each worker. Calculated under the Employee Retirement Income Security Act of 1974, as amended through 1986 ("ERISA")[1], the total present value of LTV Steel's unfunded liabilities for pension costs attributable to pre-Chapter 11 services and events was estimated in 1986 to exceed $2 billion. JA 138.[2]

[1] ERISA was subsequently amended by the Pension Protection Act (the "PPA"), Pub. L. No. 100-203 (Omnibus Budget Reconciliation Act of 1987), title IX, subtitle D, part II, 101 Stat. 1330-33 (1987), but the PPA and later amendments are not applicable to the computation of the claims filed by the PBGC against LTV. Unless otherwise specified, all references herein are to ERISA as in effect in 1986.

Upon the commencement of its Chapter 11 cases, LTV continued to operate its businesses as debtors-in-possession for the benefit of, and as a fiduciary for, its creditors and equity security holders. In Chapter 11, LTV's principal objectives are to (a) rehabilitate and streamline its businesses so as to maximize their value and (b) confirm and consummate plans of reorganization in accordance with the provisions of Chapter 11 that provide a fair recovery for all of its creditors, including the PBGC. In order to afford Chapter 11 debtors a "breathing spell" to effect a reorganization and to help assure equality of distribution among creditors, the Bankruptcy Code generally forbids a debtor from paying its pre-petition obligations except pursuant to a confirmed plan of reorganization. Thus, upon filing its Chapter 11 petitions, LTV was prohibited from making contributions to its pension plans attributable to pre-petition services or events, just as it was prohibited from making payments on its other pre-petition unsecured claims.

In order to emerge from Chapter 11, LTV must confirm plans of reorganization providing for the treatment of claims in accordance with the requirements of Section 1129 of the Bankruptcy Code. All claims against LTV that arose before the date its plans of reorganization are confirmed can be discharged by such plans, pursuant to Bankruptcy Code Section 1141(d)(1). Because LTV is insolvent by a large margin, it is expected that general unsecured creditors will receive substantially less than full payment on their claims.

Interests of the Committee

The Official Committee of Unsecured Creditors of LTV Steel Company, Inc. and Certain Affiliates (the "Committee")

[2] Citations preceded by "JA" refer to the Joint Appendix; those preceded by "Pet. App." refer to the Appendix to the Petition for Certiorari; and those preceded by "AR" refer to the Administrative Record.

was appointed by the Bankruptcy Court to represent the interests of all of the unsecured creditors of LTV Steel and its steel-related affiliates. The Committee represents thousands of creditors who in the aggregate hold claims in excess of $3 billion (not including the claims of the PBGC). These creditors include suppliers of goods and services, noteholders, employees, retirees and others.

The crux of this case is that, by unilaterally restoring three major underfunded pension plans which it had previously terminated, the Jones & Laughlin Hourly Pension Plan, Jones & Laughlin Retirement Plan, and Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (collectively, the "Plans"), the PBGC has attempted to have itself preferred over all other creditors by excluding the major part of its claims against LTV from the discharge provisions of the Bankruptcy Code and the recovery shortfalls to which the claims of all other creditors are subject. The PBGC believes that, by restoring the Plans, it can avoid, at least temporarily, having to pay to beneficiaries of the Plans more than $2 billion of benefits it has guaranteed pursuant to ERISA in excess of the value of the assets of the Plans.

The PBGC's legal theory is that, if the Plans are not terminated during the pendency of LTV's Chapter 11 cases, LTV's obligations for the underfunding of the Plans will not be discharged by confirmation of LTV's plans of reorganization and, thus, the PBGC cannot be forced to accept less than full payment on its claims. Under this theory, even if the restored Plans are reterminated shortly after LTV emerges from Chapter 11, the PBGC would be far better off than if restoration had not occurred. The PBGC would upon retermination have the benefit of the fact that the claims of all other creditors would previously have been discharged in the Chapter 11 case at a substantial discount. Moreover, by reason of changes in ERISA enacted after the original termination date, the PBGC's claims against LTV for each dollar of its guaranty liability would be substantially larger upon retermination than the original termination—even if the Plans are reterminated

before LTV emerges from Chapter 11. *Compare* ERISA Section 4062 before and after enactment of the PPA (removal of seventy-five percent cap on termination liability under Section 4062 (b)). Consequently, the PBGC's pecuniary interests favor restoration regardless of whether the restored Plans are affordable and viable.

The Committee intervened in this action because the PBGC's maneuver to circumvent the Bankruptcy Code in this manner and thwart LTV's attempt to resolve its pension liabilities as part of its Chapter 11 reorganization will, if successful, result in LTV's other creditors bearing the losses that the PBGC evades and, in all likelihood, destroy any prospect for a successful reorganization of LTV.

Termination of the Pension Plans

At the outset of its Chapter 11 cases, LTV recognized that it would need to resolve its massive pension obligations if it was to have any chance to reorganize successfully. LTV decided to seek to terminate its major underfunded pension plans in order to stem the growth of pension obligations and fix its pension plan termination liability to the PBGC under ERISA resulting from the underfunding. *See* 29 U.S.C. §1362. Fixing the PBGC's claims in this manner would facilitate treatment of those claims in a plan of reorganization in accordance with the provisions of Chapter 11.

Inasmuch as its hourly pension plans were established pursuant to collective bargaining agreements with the United Steelworkers of America (the "USWA"), LTV Steel was required under ERISA to bargain with the USWA before terminating its hourly pension plans. 29 U.S.C. §1341(a)(3); *See also* 11 U.S.C. §1113. Therefore, shortly after the Chapter 11 filing, LTV Steel approached the USWA to seek renegotiation of their 1986 collective bargaining agreement. AR 238. The USWA was adamantly opposed to renegotiation and would not support termination of the hourly pension plans. *Id.*

Thus, although LTV was prohibited as a matter of bankruptcy law from making contributions to its pension plans relating to pre-petition services and events, each month $31 million of benefits was being paid out of these plans. Uneconomic facilities continued to close and each day the pension liabilities increased by virtue of the further accrual of benefits and the additional benefits triggered by plant closings.

By September 1986, one of the salaried pension plans, the Republic Retirement Plan, was totally depleted of assets. The PBGC moved under the involuntary termination provisions of Section 4042 of ERISA to terminate the plan. AR 1.

In December 1986, the PBGC projected that LTV's status as a Chapter 11 debtor-in-possession would enable it to accumulate "just over $1 billion by the end of 1988," but understood that such cash could not be sufficient to both "finance a plan of reorganization and the ongoing [pension] [p]lans." AR 4. As a result, on January 12, 1987, in order to "avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the liability of the PBGC's insurance funds," the PBGC moved to involuntarily terminate the three Plans which are the subject of this proceeding. Pet. App. 42a. LTV consented to the terminations. Pet. App. 42a. The PBGC then filed claims exceeding $2 billion against each of the LTV debtors, and increased its already intensive involvement in the reorganization process. If the Plans remain terminated, those claims, along with those of all other general unsecured creditors, will be dealt with pursuant to plans of reorganization for the LTV debtors. The recovery by the PBGC on its claims pursuant to such plans of reorganization will, under any conceivable scenario, far exceed the eight percent average recovery historically realized by the PBGC on its claims in bankruptcy cases. Brief of Solicitor General at 16 n.10.

The 1987 Interim Labor Agreement

The PBGC guarantees some, but not all, benefits under a terminated defined benefit pension plan. In this case, the

PBGC's involuntary terminations caused severe loss of pension and other employee benefits to approximately fifteen percent of LTV Steel's retirees. Active workers not only lost benefits under the terminated Plans, they also had no vehicle for the accrual of pension benefits for service performed following termination of the Plans. Pet. App. 42a; AR 479-80. The USWA opposed the terminations, appealed the termination orders, Pet. App. 43a n.9,[3] and initiated an adversary proceeding in the Bankruptcy Court alleging that LTV Steel had violated the labor contract and Section 1113 of the Bankruptcy Code (relating to rejection of collective bargaining agreements in Chapter 11 cases). Pet. App. 8a; AR 694.

The plan terminations and resultant loss of benefits provided the impetus for renewed bargaining between the USWA and LTV Steel. LTV Steel was concerned that USWA might strike, at an estimated cost to LTV of $100 million per month.[4] Pet. App. 8a; AR 1574. After weeks of intense and complicated negotiations, an interim agreement was reached. Not only was a strike averted, but the USWA made significant concessions in a number of areas which ultimately would generate annual savings to LTV Steel estimated at approximately $50 million. Pet. App. 45a. In return, LTV Steel agreed to several new programs designed, in part, to replace some of the non-guaranteed benefits lost as a result of the

[3] The PBGC defended the terminations before the Court of Appeals for the Second Circuit which, on July 17, 1987, affirmed the involuntary termination orders. *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987) and *Jones & Laughlin Retirement Plan v. LTV Corp.*, 824 F.2d 202 (2d Cir. 1987).

[4] LTV's concern that the USWA might strike was well-founded. The USWA had struck the Wheeling-Pittsburgh Steel Company, another Chapter 11 debtor, in part for its failure to pay post-termination pension benefits, and had just concluded a six-month strike at USX Corporation, the nation's largest steel company. Pet. App. 43a. Indeed, at the very beginning of the LTV cases the USWA had struck LTV Steel's most important facility in response to LTV Steel's initial inability to pay retiree medical benefits. *In re Chateaugay Corp.*, 87 B.R. 779, 789 (S.D.N.Y. 1988). LTV Steel thereupon obtained court authority to pay those benefits. *In re Chateaugay Corp.*, 64 B.R. 990 (S.D.N.Y. 1986).

involuntary terminations of the Plans.[5] *Id.* The 1987 labor agreement is expressly designated as an interim arrangement. *Id.* A new labor agreement must be negotiated to govern the parties' relationship following LTV's emergence from Chapter 11, and that agreement will be the subject of bargaining at the same time as a plan of reorganization is completed with all of LTV's creditors. AR 241.

Nonetheless, the PBGC took the position that unspecified aspects of the proposed agreement violated a PBGC "policy" against post-termination benefits and, therefore, was abusive. LTV, the PBGC and the USWA held several meetings in July 1987 in an effort to clarify and resolve the PBGC's objections to the proposed agreement, but the PBGC was unwilling or unable to specify its objections to the collective bargaining agreement. Pet. App. 49a-50a; AR 523-24, 658. The validity of the post-termination pension arrangements was the only matter at issue; LTV Steel's financial status was not discussed. Pet. App. 125a-26a.

Bankruptcy Court Approval of The 1987 Interim Agreement

LTV Steel promptly sought Bankruptcy Court authorization to enter into the interim labor contract. The PBGC attempted, unsuccessfully, to prevent the Bankruptcy Court from considering the matter, and then argued in the Bankruptcy Court in opposition to the 1987 interim agreement. At the hearing on LTV Steel's application, LTV's witnesses testified without contradiction that the interim agreement was necessary to avoid a crippling strike and to give LTV a chance to reorganize. Pet. App. 45a. On July 16, 1987, the Bankruptcy Court approved the interim labor agreement, including the post-termination pension arrangements.

[5] The new programs, which do not provide a full recovery of the level of benefits lost, also differ substantively from the terminated Plans, most notably in that none of the new programs is a defined benefit plan and none of the programs is guaranteed by the PBGC.

Restoration

On eight occasions the PBGC unsuccessfully attempted in the Bankruptcy Court, the District Court and the Court of Appeals to stay approval and implementation of the collective bargaining agreement. The PBGC appealed the order approving the interim agreement to the District Court, raising its abuse argument. After LTV moved to dismiss the appeal, the PBGC, without explanation withdrew the appeal without prejudice to renewal and, thus, abandoned its efforts to obtain judicial vindication of its asserted policy against certain post-termination pension arrangements. At the same time, the PBGC was attempting, unsuccessfully, to obtain Congressional sanction for its policy.

Following these actions, the Board of Directors of the PBGC held a 15 minute telephone meeting, its first meeting in eight years, AR 598, and gave blanket approval for any restoration action the PBGC Executive Director might choose to take. Pet. App. 49a. Thereafter, on September 22, 1987, the Executive Director sent LTV the first Notice of Restoration ever issued by the PBGC. AR 1578-79; Pet. App. 125a. The Notice purported to restore the terminated Plans. Pet. App. 125a.

The PBGC's Analysis

The PBGC asserted three bases for restoration: (1) LTV Steel's "abuse" of ERISA in establishing the post-termination pension arrangements negotiated with the USWA and approved by the Bankruptcy Court; (2) "LTV Steel's improved financial circumstances," and (3) "LTV Steel's demonstrated willingness to fund employee retirement arrangements."[6] AR 1578. No further explanation or analysis was set forth in the Notice of Restoration.

[6] The PBGC subsequently abandoned its "demonstrated willingness" argument before the Court of Appeals, and no longer relies on it as a basis for restoration. Pet. App. 25a.

As the District Court and the Court of Appeals found, the administrative record reveals a haphazard process of inadequate factual development and faulty analysis. The PBGC relied upon fewer than ten pages of the "administrative record" to explain its administrative action. Fewer than forty pages reflect regulatory consideration, as opposed to pre-existing documents relating to creditor/adversary action. AR 1-14a, 637-45, 1154-55, 1577-84. The basis for the PBGC's finding of "abuse" is set forth in three conclusory paragraphs of one PBGC affidavit. AR 224-25. Three pages of another document record a rudimentary financial "analysis," comparing a projection of LTV Steel's cash flow and the minimum cash needed to fund the Plans. AR 12-13.

Incredibly, the PBGC's own administrative record shows that its decisions first to terminate the Plans in January 1987 and then to restore the Plans in September of the same year were based on the same LTV two-year business plan. Pet. App. 112a-13a. Moreover, the PBGC knew that a revised and updated seven-year business plan would be made available imminently. Pet. App. 128a n.46. With reference to that two-year business plan, the PBGC staff stated at the first meeting to discuss restoration that at the time of termination a "financial analysis presented to the group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding requirements." Pet. App. 113a n.37. The only additional information considered by the PBGC at the time of restoration was LTV Steel's performance and its accumulation of cash during the first five months of 1987. Pet. App. 113a.

Effect of Restoration

Almost two and one-half years have passed since the PBGC issued its Notice of Restoration. Through restoration, the PBGC is essentially seeking to exclude its claims from being dealt with on a par with the claims of other creditors in the LTV Chapter 11 cases. Because of the size of the PBGC's

claims and their pivotal role in the Chapter 11 cases, the PBGC's unilateral restoration decision has put the LTV Chapter 11 cases—along with the hopes of thousands of other creditors to receive reasonably timely recovery on their claims—into a prolonged state of limbo. Thus, three and one-half years after these Chapter 11 cases were commenced, no plans of reorganization have been filed, creditors holding billions of dollars of pre-petition unsecured claims have not received any recovery from LTV and the fate of the third largest steel producer in the United States (as well as a major defense and aerospace contractor) has been furtherjeopardized.

Had the PBGC continued on its course of attempting to enforce its "policy" on "abusive follow-on plans" through judicial means by continuing its appeal from the order approving the interim collective bargaining agreement, no such result would have ensued. The courts would have determined the legitimacy of the challenged post-termination pension arrangements under applicable law, and such arrangements would ultimately have been validated or discontinued. In either event, LTV's reorganization could have progressed. Instead, by reason of its selection of the extraordinary and unprecedented restoration remedy, the PBGC has caused the Chapter 11 process to grind almost to a halt. Consequently, all other creditors have been exposed to inordinate risk, delay and expense.

The Decision Below

The PBGC filed a complaint in the District Court for the Southern District of New York seeking enforcement of its administrative restoration, and moved for summary judgment. In its papers, the PBGC stated that if the Plans were restored LTV would have to resume funding the Plans immediately. On June 22, 1988, District Judge Sweet issued an opinion denying summary judgment and vacating the Notice of Restoration. Pet. App. 28a. Judgment remanding the mat-

ter to the PBGC was entered on September 13, 1988. Pet. App. 132a. The PBGC appealed the judgment to the Court of Appeals for the Second Circuit, which issued a decision affirming the District Court decision. Pet. App. 1a.

The Court of Appeals found the PBGC's restoration of the LTV Plans was arbitrary and capricious on numerous grounds:

1. The agency failed to "adequately [consider] the policies and goals of the bodies of law involved in this case" —ERISA, bankruptcy law and labor law—"and their interaction with each other," Pet. App. 17a.

2. "Even when we examine the factors upon which PBGC did base its decision, we find no support in the administrative record for the conclusion reached," Pet. App. 17a, specifically finding that:

a. The PBGC had no support in the administrative record for its conclusion that the post-termination pension arrangements were abusive "follow-on" plans. Pet. App. 19a.

b. The PBGC's "financial improvement" rationale was based on "fundamental, yet unexplained and unexamined assumptions." Pet. App. 22a.

c. The PBGC "did not effectively assess the impact that LTV's status as a debtor in Chapter 11 reorganization had on its financial condition." Pet. App. 23a.

d. "[N]owhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated." Pet. App. 25a.

e. "PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards ... nor provided a statement showing its reasoning in applying those standards." Pet. App. 26a.

Perhaps the most significant aspect of the Court of Appeals' decision is its recognition that the "[p]ension benefits accrue to employees as a result of their past labor on behalf of [LTV]" and, therefore, "any claims arising out of LTV's obligation to pay into the pension fund plans are pre-petition debts." Pet. App. 23a. "Pre-petition debts are satisfied by a fair distribution of the debtor's assets . . . among the creditors, with the pension plans receiving no special priority." Pet. App. 23a-24a. The Court pointed to the PBGC's failure to consider that "[w]hen all the pre-petition claims of LTV's other creditors are considered, and they receive their fair share of any additional funds, LTV's apparent ability to fund the Plans suffers," as further evidence that the PBGC's decision to restore the Plans was made without regard to the viability of the restored Plans. Pet. App. 24a.

SUMMARY OF ARGUMENT

1. The Court of Appeals correctly held that the PBGC's decision to restore the terminated Plans because of the changed financial circumstances of LTV was arbitrary, capricious and utterly unjustified under the circumstances. The PBGC's decision has had a devastating effect on the efforts of LTV, the nation's third largest steel producer and a major defense and aerospace manufacturer, to reorganize under Chapter 11, and has delayed for years payments to LTV's other creditors.

The terminated Plans can be restored by the PBGC if—and only if—they would be affordable and viable for the foreseeable future. The mere existence of post-termination pension arrangements that the PBGC considers to be abusive, regardless of whether such post-termination pension arrangements are or are not violative of applicable law, cannot justify restoration of the Plans. Notwithstanding the express

reviewable record, its failure adequately to apprise LTV of the grounds for restoration and its failure to give LTV adequate opportunity to rebut those grounds." Pet. App. 123a.

F. The Court Of Appeals Decision.

The Court of Appeals for the Second Circuit affirmed, agreeing with the district court's conclusion that the PBGC's restoration determination was arbitrary and capricious. Pet. App. 14a-17a.

Relying on this Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), holding that an agency must consider "all relevant factors," the court held that "[b]ecause ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of law, and, to the extent possible, honored the policies underlying them." Pet. App. 14a-15a. It concluded that the PBGC had not "adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other." Pet. App. 17a. Rather, PBGC "focused inordinately on ERISA." *Id.*

Alternatively, the court held that the PBGC's analysis under ERISA, without regard to competing federal policies, was "insupportable as a matter of law." *Id.* First, the court found no support for the PBGC's adoption of a *per se* rule that the establishment of a follow-on plan by itself is a sufficient basis for restoration, noting that Congress was consistent in its refusal to include in ERISA proposed provisions outlawing follow-on plans. Pet. App. 17a-20a. The court of appeals also

agreed with the district court that the PBGC's assessment of LTV Steel's improved financial condition was seriously flawed and could not support restoration. Pet. App. 21a-25a. Finally, the court of appeals agreed that the PBGC utilized inadequate procedures.

The court of appeals remanded to the PBGC, explaining that "[o]n remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the district court and to us, its decision cannot be upheld." Pet. App. 27a.

G. The Impact Of Restoration.

The status of the three Plans – terminated or restored – and the disposition of approximately $2.3 billion in unfunded pension benefit obligations affects all creditors of LTV Corp. and LTV Steel, as well as creditors of all the other Debtors. Assuming LTV Steel could afford to fund restored Plans while it and the other members of its controlled group successfully reorganize, the goals both of ERISA and of the federal bankruptcy laws would be achievable. However, an improvident restoration – one in which the impact of LTV Steel's funding obligations on the prospects of reorganization of all of the Debtors has not been properly evaluated – could well lead to imminent retermination of the Plans and the liquidation of all Debtors. Liquidation would frustrate the goals of ERISA, the Bankruptcy Code and the labor laws.

Retermination of the Plans could also have a drastic, adverse effect on all creditors in these bankruptcy reorganization cases. The 1987 amendments to the pension laws increased the

joint and several liability of terminated plan sponsors and their controlled group of corporations (which here includes the parent, LTV Corp. and LTV Aerospace & Defense Company), from 75% of unfunded guaranteed benefits to 100% of benefit liabilities. *Compare* SEPPAA, §11011(a), amending ERISA §4062(b), 29 U.S.C.A. §1362(b)(1)(A) (Supp. IV 1986) with the PPA, amending ERISA §4062(b), 29 U.S.C.A. §1362(b)(1)(A) (West. Supp. 1988). Were the PBGC to reterminate these pension plans, or were the bankruptcy court to approve a voluntary distress termination after the restoration, the PBGC might seek to increase its claim to 100% of the unfunded benefit liabilities. If the court found that the new law applied, the PBGC's claim would be increased by approximately $800 million. Pet. App. 121a. Although the Plans in question are sponsored by LTV Steel – not LTV Corp. – the prospects of recovery by parent creditors may be seriously affected by the provisions in ERISA that provide for "joint and several" liability of members of the controlled group on a termination claim.[10]

A decision by this Court as to the status of the Plans affects the interests of all LTV Corp.'s and LTV Steel's creditors, but that decision may affect each creditor constituency differently.

[10] In the bankruptcy court, the Parent Creditors' Committee objected to the PBGC's claims. These objections, which are still pending, raise the issue whether such full controlled group liability on the parent LTV Corp. violates the constitutional rights of LTV Corp. and its creditors.

SUMMARY OF ARGUMENT

1. The administrative record does not support the PBGC's Notice of Restoration of the Plans, and the courts below correctly vacated the PBGC's Notice and remanded the matter to the PBGC for further development of the factual record. An employer's adoption of a follow-on plan does not automatically justify restoration by the PBGC of a terminated plan. Congress carefully considered and explicitly rejected a proposed statutory prohibition against follow-on plans, and withheld from the PBGC the power to adopt such a "per se" rule and to use retaliatory restoration to deter this supposed "abuse" of the pension insurance program. Moreover, the courts below were correct in concluding that the PBGC's optimistic assessment of LTV Steel's financial condition was not based on an adequately-developed administrative record.

2. On remand to the PBGC, however, the PBGC should confine its consideration exclusively to the issues under ERISA involved in restoration. When the sponsor of a terminated pension plan is a debtor in the process of reorganization under Chapter 11 of the Bankruptcy Code, and pension plan obligations are a part of a collective bargaining agreement governed by the federal labor laws, the decision to give effect to restoration of the pension plan requires careful consideration by a tribunal that is familiar with the delicate and complex process of bankruptcy reorganization, of the competing and often inconsistent policies of ERISA and the purposes and mechanics of reorganization under the Bankruptcy Code.

The PBGC has neither the statutory authority nor the expertise to apply ERISA in a fashion that properly effectuates the competing, non-ERISA federal policies. On the contrary, even in the context of a Chapter 11 bankruptcy case, the PBGC may "determine" to restore solely according to ERISA standards.

The Parent Creditors' Committee concurs with the Solicitor General's suggestion that the PBGC lacks statutory authority to evaluate non-ERISA concerns in making a restoration determination. U.S. Br. at 13, 20. Therefore, in the context of the bankruptcy reorganization process, the PBGC's determination is neither self-executing, nor conclusive. Only the courts possess the statutory authority and expertise to harmonize the goals of ERISA, the federal bankruptcy laws and the federal labor laws and to give appropriate effect to a restoration determination by the PBGC in the context of a bankruptcy reorganization case under Chapter 11. Moreover, in a case such as this, where the district court has entered an order terminating a pension plan, the PBGC has no authority to undermine and contradict a prior district court termination order by unilaterally ordering restoration. Again, action by the court to vacate the prior order is required fully to implement the PBGC's restoration determination.

3. As both the PBGC and the Solicitor General concede, the standard articulated in ERISA §4041(c)(2)(B)(ii) embodies Congress' statutory harmonization of bankruptcy and ERISA concerns when a Chapter 11 debtor seeks to terminate a pension plan. Here, where the Debtors oppose

restoration and contend that the Plans should remain terminated, the same standard is applicable. Section 4041(c)(2)(B)(ii) expresses Congress' intent that pension plans continue in effect during and "ride through" the bankruptcy reorganization whenever possible. Only if the court finds that the restored pension plan obligations cannot be made a part of any successful reorganization plan, *i.e.*, one which will allow the debtors to pay their debts as restructured by and pursuant to a plan of reorganization and continue in business outside the Chapter 11 reorganization process, should a previously terminated pension plan remain terminated. Conversely, if there is a confirmable plan of reorganization that contemplates restoring the pension plans, and the PBGC, in compliance with ERISA guidelines, determines to restore, the court must confirm that plan over an alternative plan that does not provide for restoration.

I. THE COURTS BELOW CORRECTLY VACATED THE PBGC'S RESTORATION DETERMINATION.

Applying the standard set forth in the APA, 5 U.S.C. §706(2)(A),[11] the court of appeals held that

[11] Although the PBGC does not clearly articulate the standard of review it advocates, it cites *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). PBGC Br. at 18. In *Chevron*, which dealt with the deference to be given to an administrative agency's interpretation of a statute when the statutory scheme is ambiguous or silent, the Court stated that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 843-44. The Court said that if the legislative delegation is implicit rather than explicit, "a

the PBGC acted arbitrarily and capriciously in making a determination to restore LTV Steel's three, previously-terminated pension plans. The court concluded that the PBGC acted arbitrarily and capriciously in basing restoration on the fact that LTV Steel's interim labor agreement replaced some of the benefits lost as a result of termination and in fashioning a *per se* rule that replacement of benefits constitutes an "abuse" of ERISA's pension termination insurance program sufficient by itself to justify restoration. The court of appeals also concluded that the PBGC's finding that LTV Steel's and LTV Corp.'s[12] financial condition had improved sufficiently to allow them to fund restoration was unsupported by the administrative record. In addition, the court of appeals based its decision on the PBGC's failure adequately to consider competing federal bankruptcy and labor law policies.

NOTES *(Continued)*

court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Thus, if the agency's interpretation is either arbitrary or capricious or unreasonable, it may be overturned.

In *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1861 n.23 (1989), the Court noted that "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." Accordingly, whether the Court applies the *Chevron* standard or the "arbitrary and capricious" standard under the APA is of little practical significance here.

[12] Although the court of appeals in its opinion referred to LTV Corp. and LTV Steel collectively as "LTV" and the briefs of both the PBGC and the United States in this Court perpetuate this confusion, the separate corporate existence of LTV Corp. and LTV Steel is important to observe in the context of these bankruptcy reorganization cases because of the distinct statutory obligations and the differences in the composition of the creditors of the respective members of the corporate group.

The courts below correctly invalidated the PBGC's Notice of Restoration based on the first two grounds, which, considered together or independently, warrant affirmance of the judgment on review by this Court.

A. The PBGC's Conclusion, That The LTV Steel Interim Collective Bargaining Agreement Was "Per Se" Abusive Of The Pension Termination Insurance Program And Therefore Justified Restoration, Was Unreasonable.

As the PBGC frames the question presented in this case, the issue is whether "a reviewing court [may] foreclose the [PBGC] from considering whether restoration is appropriate to remedy abuse of the federal pension insurance program." PBGC Br. at (i). Clearly, this is not the issue.[13]

[13] Although the PBGC and the United States have also identified as an issue the question whether LTV Steel pension liabilities are "pre-petition debts" enjoying "no special priority," or administrative expenses under 11 U.S.C. §503(b), entitled to first-level priority under 11 U.S.C. §507(a)(1), See PBGC Br. at 37-38, U.S. Br. at 22-23, n.18, and have referred to confusing language in the court of appeals' decision, Pet. App. 23a-24a, this court does not have before it any issue concerning the priority of whatever claims exist or may arise, whether on terminated plans or restored plans. The Parent Creditors' Committee would dispute the Debtors' argument that restoration is meaningless because LTV Steel cannot make contributions while it is in the process of reorganization before confirmation of a plan of reorganization "without an extraordinary court order." *See* Brief for Appellees, the LTV Corporation, The LTV Steel Company, Inc., *et al.* in No. 88-6244 (2d Cir.), pp. 40-41, n. **, and takes issue with the Debtors' refusal in December 1986, to make contributions to the Plans because LTV Steel "is currently in reorganization under Chapter 11 of the Bankruptcy Code." JA 125-126.

Nonetheless, these questions and the many subsidiary issues flowing from them are not properly before this Court. Although these issues are important to bankruptcy administration in these and other cases, the bankruptcy court here has not yet definitively dealt with them. This Court should avoid addres[illegible]ng these issues prematurely before the courts below have had a full opportunity to

Neither the court of appeals nor the district court held that the PBGC was precluded from restoring a pension plan when an "abuse" had occurred. Indeed, if an employer "abuses" the system by shifting to the federal pension insurance program liabilities that the employer can actually afford, the decisions of the courts below would not prevent the PBGC from determining that restoration is appropriate. Moreover, in considering restoration and in evaluating an employer's ability to fund a pension plan, the PBGC is not foreclosed by anything in the decisions of the lower courts in this case from considering the cost of a follow-on plan. The employer's willingness and ability to pay the cost of such a follow-on plan is clearly one relevant fact to consider in determining whether an employer has the financial capability to fund the entire plan in its original form.

Rather, the question presented here is whether PBGC has erroneously fashioned and applied a *per se* rule that whenever a sponsoring employer, after it has terminated a pension plan, adopts a follow-on plan that substantially replaces nonguaranteed benefits, such a follow-on plan constitutes an abuse and whether, under such circumstances, ERISA §4047 confers upon the PBGC the power to restore the original pension plan. *See,*

NOTES *(Continued)*

explore them. However, in view of the confusion engendered by certain language in the court of appeals' opinion, this Court may wish to invite the court of appeals on remand to clarify its discussion of these issues, in which it appears to have blurred the crucial distinction between statutory termination liability claimed by the PBGC and post-petition contributions payable by a sponsoring employer to ongoing pension plans.

e.g., PBGC Br. at 23. Under the PBGC's construction of §4047, the PBGC need consider neither the employer's ability to fund the plan nor any of the other considerations upon which the previous involuntary termination of the plan rested.

The PBGC's unreasonable interpretation of §4047 was properly rejected by both the district court and the court of appeals below.

1. The Courts Below Correctly Rejected As Unreasonable The PBGC's Contention That ERISA §4047 Authorizes Restoration As A Sanction For Adoption Of A Follow-On Plan.

Section 4047 of ERISA provides that the PBGC may "take such actions as may be necessary to restore" a terminated pension plan where the PBGC "determines such action to be appropriate and consistent with its duties" under ERISA.[14]

[14] Section 4047 of ERISA, 29 U.S.C. §1347, provides:

Whenever the corporation determines that a plan which is to be terminated under section 4041 or 4042, or which is in the process of being terminated under section 4041 or 4042, under this subtitle should not be terminated under section 4041 or 4042 as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 4041 or 4042. *In the case of a plan which has been terminated under section 4041 or 4042, the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.*

The duties of the PBGC under ERISA, as enumerated in §4002(a), 29 U.S.C. §1302(a) are:

(1) "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,"

(2) "to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies," and

(3) "to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title."

ERISA also imposes other duties on the PBGC. These include involuntary termination of single-employer pension plans under certain circumstances. ERISA *requires* the PBGC to terminate a plan when "the plan does not have assets available to pay benefits which are currently due under the terms of the plan." *See* ERISA §4042(a), 29 U.S.C. §1342(a). It gives the PBGC the authority to terminate a plan when "the plan will be unable to pay benefits when due" or when "the possible long run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." *Id.*

When it started proceedings to terminate the three Plans at issue in this case, the PBGC found that LTV Steel was unable to meet ERISA's minimum funding standards, that without termination the severe underfunding of the Plans would increase, and that termination was required to

"avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the liability of the PBGC." Pet. App. 42a. *See* PBGC Br. at 9; JA 140; AR 1257, 1384, 1507. Thus, the PBGC determined that it is appropriate and consistent with its duties to terminate pension plans under those circumstances.

In light of its own stated reasons for terminating the Plans, the PBGC's contention that restoration is justifiable, without more, simply as a deterrent measure to discourage the establishment of follow-on plans, and particularly without regard to the continued cogency of the original reasons justifying termination, is unfounded. Retaliatory restoration under such circumstances is clearly not "appropriate and consistent with [the PBGC's] duties" under ERISA, which include assuring that funding occurs and that its own liability is minimized.

2. The Legislative History Of ERISA §4047 Refutes The PBGC's Contention That Congress Intended To Entrust The PBGC With The Power To Deter Follow-On Plans With The Sanction Of Restoration.

The legislative history of ERISA §4047 shows that Congress was concerned with the financial ability of employers to fund pension plans. As the court of appeals observed, "Congress' focus in enacting section 4047 was mandating restoration if there was an improvement in financial circumstances." Pet. App. 17a. Congress intended the PBGC to take steps to restore a plan when the employer could afford to fund the terminated plan. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin.

News 5038, 5157-58. In such cases, the original grounds for termination no longer exist. The court of appeals correctly observed that the "legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration." Pet. App. 17a.

As the courts below both correctly observed, Congress only specifically identified the employer's improved financial condition as an appropriate basis for restoration under ERISA. Pet. App. 17a-18a, 93a-100a. Reporting on the original provisions of ERISA in 1974, the House Conference Report states, for example, that the PBGC may cease termination proceedings "if the employer and plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable." H. R. Conf. Rep. No. 1280, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157. According to the House Report, the PBGC may restore a terminated plan "if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent." *Id.* at 5158.

The legislative history of the 1986 amendments to ERISA, which contained technical changes to §4047, likewise confirms that Congress neither intended to permit the PBGC to employ restoration as a weapon to punish employers who "abused" the termination insurance program, nor expressed the view that follow-on plans constituted an abuse. In the House Report on SEPPAA, Congress specifically identified the anticipated abuses of the insurance system which it believed

warranted legislative action and discussed the appropriate protection against such abuses. H. Rep. No. 241, 99th Cong. 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 690-700. Significantly, this crucial piece of the legislative history of §4047 does not so much as identify follow-on plans as an abuse. Nor does it provide any indication that Congress intended to authorize the PBGC to use its power to make a restoration determination to deter any of the abuses it specifically identified.

When Congress addressed the abusive shifting of pension liabilities on the PBGC, it stated that this practice should be remedied through the new "objective criteria for employer distress" and the increase in underfunding liability to the PBGC in §4062(b) above the 30% net worth cap contained in the old law. *Id.* at 690. The House Report states "these provisions will help close the door to abusive claims against the termination insurance program." *Id.* at 690. In fact, in the course of enacting the 1987 amendments to ERISA, Congress specifically considered prohibiting replacement plans, but *declined to do so. See, e.g.*, House Conf. Rep. No. 495, 100th Cong., 1st Sess., *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1626 through 1631.

In 1987, four Congressional committees considered and recommended legislation dealing with Title IV of ERISA. Only the House Ways and Means Committee suggested legislation prohibiting replacement plans. The Ways and Means Committee noted that "*[u]nder present law, an ongoing entity* can continue in operation on a profit making basis after transferring liability to the PBGC and

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; . . .

11 U.S.C. §1129(a)(7). In other words, in order for a plan of reorganization to be confirmed, each holder of an impaired claim or interest that has not accepted the plan—regardless of whether its class has accepted the plan—must receive or retain under the plan on account of such claim consideration having a present value at least equal to the amount it would receive or retain if the debtor were liquidated under Chapter 7 of the Bankruptcy Code. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 126, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5912. Indeed, if the Plans are restored and the Committee determines that unsecured creditors of LTV Steel will recover more on their claims in a Chapter 7 liquidation than pursuant to a Chapter 11 plan of reorganization and, if the situation is not rectified by retermination of the restored Plans, the Committee would be bound by its fiduciary duties to the creditors it represents to seek conversion of LTV Steel's Chapter 11 reorganization case to a Chapter 7 liquidation case pursuant to Section 706(b) of the Bankruptcy Code.

In order to consider whether restoration might prevent LTV from being able to satisfy the requirements of Section 1129(a)(7) of the Bankruptcy Code, the PBGC should have compared (a) the amount available for distribution to creditors (other than the PBGC) under a Chapter 11 plan of reorganization assuming restoration of the Plans with (b) the amount available for distribution to those creditors in a Chapter 7 liquidation, assuming termination of the Plans. Because (i) in the restoration scenario, LTV would be responsible for hundreds of millions of dollars of pension obligations that accrued or vested after the termination date for which it would not be liable in the termination scenario and (ii) the

PBGC assumes that the restored Plans would receive full payment on LTV's obligations in the restoration scenario and presumably does not anticipate full payment in the termination scenario, it is likely that, if the PBGC had considered the possibility of satisfying Section 1129(a)(7) of the Bankruptcy Code, it would have realized that restoration would have rendered reorganization of LTV impossible. Any assumption by the PBGC that liquidation of LTV in a Chapter 7 will result in a fire sale of assets which will necessarily yield lower recoveries for unsecured creditors is erroneous. Such an assumption fails to consider the provisions of the Bankruptcy Code which are designed to permit realization of going-concern values even in a Chapter 7 case. [10]

In any event, it is clear that the failure of the PBGC to even consider this crucial issue bearing on LTV's future and the viability of the restored Plans resulted in an arbitrary and capricious decision.

Restoration would also have a clear and readily foreseeable effect on the ability of LTV to satisfy Section 1129(a)(11) of the Bankruptcy Code, which requires that, as a prerequisite to confirmation of a plan of reorganization, the Bankruptcy Court must find that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. §1129(a)(11).

[10] LTV and its affiliates may continue to operate their respective businesses pending the sale of such entities as going-concerns in the context of Chapter 7 liquidation proceedings. *See* 11 U.S.C. §721. Thus, it would be improper for the PBGC to assume that conversion to Chapter 7 would result in the loss of going-concern values. In addition, because Section 1113 of the Bankruptcy Code does not apply in Chapter 7 liquidation proceedings, the estates would have an enhanced ability to reject the interim labor agreement, enabling LTV or the bankruptcy trustee to effectuate a distress termination of the Plans under ERISA.

Thus, plans of reorganization for LTV can be confirmed only if LTV would likely be able to meet its future obligations (including its obligations to the restored Plans) and if the plans of reorganization provide for all material contingencies—such as retermination—which could ultimately result in LTV being required to undergo further financial reorganization or liquidation. *See Pizza of Hawaii, Inc. v. Shakey's, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985) (plan was not feasible where debtor failed to provide for enormous contingent debt).

The PBGC failed to consider whether (a) LTV would likely be able, following confirmation of its Chapter 11 plans of reorganization and for the foreseeable future, to meet both its obligations to creditors under the plans of reorganization and to the restored Plans under ERISA and (b) it would be practicable in plans of reorganization to provide for the possibility of retermination of the restored Plans. Again, this failure resulted in an arbitrary and capricious restoration decision.

As demonstrated above, restoration of the Plans would have a clear and readily foreseeable impact on the ability of LTV to satisfy key express requirements of Chapter 11 of the Bankruptcy Code for confirmation of plans of reorganization. As a result, restoration of the Plans might well force LTV into liquidation proceedings under Chapter 7 of the Bankruptcy Code or put the Bankruptcy Court into the position of authorizing retermination as the only means of permitting LTV's survival. In either event, the restored Plans would be reterminated. Inasmuch as ERISA was amended after the original termination date so that the provisions which would be applicable to computation of the PBGC's retermination claims against LTV are far more favorable to the PBGC than the provisions governing computation of its original termination claims, the PBGC would reap a windfall from its own improper restoration decision. *Compare* ERISA Section 4062 before and after enactment of the PPA (removal of seventy-five percent cap on termination liability under Section 4062(b)). The PBGC's failure to even consider the effect of

restoration on LTV's ability to satisfy those express Bankruptcy Code prerequisites to plan confirmation clearly renders its decision to restore the Plans arbitrary and capricious. More to the point, the fact that the PBGC so acted without considering whether it was triggering the liquidation of the third largest producer of steel in the United States and a major aerospace and defense contractor is simply unconscionable.

C. The PBGC's Failure To Consider The General Unsecured Status Which Would Be Accorded To Plan-Related Claims Even In The Event Of Restoration Was Arbitrary And Capricious.

The PBGC asserts that, in the event of restoration, all of the claims arising out of LTV's contributions to the restored Plans which, absent bankruptcy, would have been payable during the pendency of the Chapter 11 cases would be entitled to administrative priority. The PBGC is wrong. Except for claims based upon benefits earned by post-petition services, the pension claims at issue are derived from labor provided by LTV Steel's employees prior to the filing of the petitions and thus are pre-petition claims not representing "actual and necessary" expenses of preserving the Chapter 11 estates entitled to administrative status. *See* Pet. App. 23a. By failing to appreciate that even in the event of restoration the Plans would only receive partial payment on their claims against LTV, the PBGC ultimately miscalculated the viability of the Plans if restored. In fact, there is no indication that the PBGC ever considered this factor in determining the potential viability of the restored Plans.

Section 101(4) of the Bankruptcy Code defines "claim" to mean:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, *unmatured*, disputed, undisputed, legal, equitable, secured, or unsecured ....

11 U.S.C. §101(4) (emphasis added). The legislative history of 11 U.S.C. §101(4) reveals that Congress intended to define pre-petition claims broadly:

> The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal equitable, secured, or unsecured.... By this broadest possible definition, and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits that broadest possible relief in the Bankruptcy Court.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6266; *see also* S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5807-08. The broad definition of "claim" is central to the policy of a "fresh start" for a debtor and permits a debtor to receive the "broadest possible relief in the bankruptcy court," because liability on a "claim" can be discharged only by the confirmation of a plan of reorganization. *Id.; see* 11 U.S.C. §§ 101(11), 1141(d); *see also In re A.H. Robins Co.*, 63 B.R. 986, 989 (E.D. Va. 1986), *aff'd sub nom., Grady v. A.H. Robins Co.*, 839 F.2d 1908 (4th Cir. 1988); *In re Remington Rand Corp.*, 836 F.2d 825 (3d Cir. 1988); *In re Robinson*, 776 F.2d 30, 34 (2d Cir. 1985), *rev'd on other grounds*, 479 U.S. 36 (1986).

An analysis of the pertinent provisions of ERISA reveals that the majority of the contributions to the restored Plans would constitute claims as of the petition date which arose from pre-petition services and events.

Among the most important features added to the law by ERISA to promote pension plans and afford employees and retirees reasonable security were the minimum funding requirements. S. Rep. No. 383, 93rd Cong., 1st Sess. 81, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890; H.R. Rep. No. 533, 93rd Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639. Prior to ERISA, the only funding requirement for a pension plan (in order to remain qualified under the Internal Revenue Code) was simply to pay its normal (*i.e.*, current year) cost and to pay interest on its past service liability (*i.e.*, the cost of providing benefits for years of service before the plan was established, or before a benefit improvement was adopted). Recognizing that the law at the time did not even require an employer to begin reducing its past service liabilities, Congress adopted minimum funding standards designed to fund those existing liabilities over time. *See* 26 U.S.C. § 412(b) and 29 U.S.C. § 1082.

As enacted by ERISA, the minimum funding rules require an employer to make an annual contribution at least equal to the sum of (1) the normal cost of the plan for the plan year, and (2) the amount necessary to amortize (i) the pre-ERISA unfunded past service liability over 40 years, (ii) post-ERISA unfunded past service liabilities over 30 years, (iii) the plan's net experience loss over 15 years, (iv) the plan's loss resulting from changes in actuarial assumptions over 30 years, and (v) funding waivers over 15 years. 26 U.S.C. §412(b); 29 U.S.C. 1082(b).[11] Thus, one of the purposes of the funding requirements is to set the minimal annual rate at which a pension plan's past service liability is to be funded. Nothing in the minimum funding requirements, however, changes the

[11] The minimum funding provisions were amended by PPA §9307 to change the amortization periods for experience losses, changed actuarial assumptions and funding waivers. In addition, Section 412(l) was added by PPA §9303 (subject to special rules for steel companies) to require additional funding for certain underfunded plans. Those changes were not applicable to the Plans when they were involuntarily terminated in January 1987. More importantly, even as amended by the PPA, the minimum funding requirements continue to recognize the distinction between normal cost and past service liability.

fact that past service liabilities are existing obligations; ERISA merely provides for the period over which such liabilities are to be paid.[12]

To put it in context, the past service liabilities under the plans which existed immediately prior to the filing of Chapter 11 petitions are neither increased nor decreased by subsequent service by covered employees. The fact that under ERISA, an employer may amortize those past service liabilities in future years does not change the fact that those liabilities constituted claims as of the filing date which, except to the extent expressly given priority, are merely general unsecured claims. Since the past service liabilities constituted claims as of the petition date, they cannot be administrative expenses.[13]

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[12] Moreover the minimum funding rules under ERISA recognize a distinction between current normal costs and past service liabilities.

[13] The Committee recognizes that in *Columbia Packing Co. v. Pension Benefit Guar. Corp.*, 81 B.R. 205 (D. Mass. 1988), the court addressed the priority status of the PBGC's due and unpaid contribution claims and concluded that the entire statutory funding obligation, including the past service liability cost, which became due during the post-petition period represented an expense entitled to administrative priority. *Id.* at 207-09. Accordingly, the court held that "the amount of an employer's contribution that is payable under Sections 507(a)(1) and (4) is the amount of the standard funding account deficiency that accrues, on a daily basis, during the priority period, which amount is adjusted to reflect the true normal cost chargeable to the funding account during that period." *Id.* at 210. This Court should not follow *Columbia Packing*. The decision cannot be reconciled with existing case law, *see Pet. App. 23a-24a; Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986), which established that the resolution of the administrative priority issue turns on when the employees provided labor in consideration for receiving pension benefits from the debtor, not the date on which the debtor's payments fall due. Indeed, under the rationale of *Columbia Packing*, a debtor's prepetition obligations in respect of its underfunding of benefits earned by thousands of workers would be converted into an administrative expense if the debtor was obligated to make a pension contribution for the post-petition services of a single worker.

Section 507 of the Bankruptcy Code sets forth the expenses and claims against a debtor's estate that are entitled to priority. 11 U.S.C. §507. Section 507(a)(1) gives first priority to administrative expenses allowed under Section 503(b) of the Bankruptcy Code, which include claims for "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. §503(b)(1)(A). These priorities must be narrowly construed. *See, e.g., Trustees of Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100-01 (2d Cir. 1986); *In re United Merchants & Mfrs., Inc.*, 597 F.2d 348, 349 (2d Cir. 1979). "[I]f one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson v. National Labor Relations Bd:* 344 U.S. 25, 29 (1952). The claimant must bear a heavy burden to establish entitlement to administrative priority. *See In re Chateaugay Corp.*, 102 B.R. 335, 353 (S.D.N.Y. 1989), *appeal docketed*, No. 89 Civ. 6687 (S.D.N.Y. Sept. 11, 1989); *In re Amfesco Indus., Inc.*, 81 B.R. 777, 785 (E.D.N.Y. 1988)("administrative priority . . . should only be granted under extraordinary circumstances, to wit, when the parties seeking priority have sustained their burden of demonstrating that their services are actual and necessary to preserve the estate").

To obtain administrative status, a claim must meet a two-part test. It must arise from a transaction with the debtor-in-possession and it must benefit the debtor-in-possession in the operation of its business. *See Trustees of Amalgamated Ins. Fund*, 789 F.2d at 101; *In re Jartran, Inc.*, 732 F.2d 584, 587 (7th Cir. 1984); *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976); *In re Chateaugay Corp.*, 102 B.R. at 353; *In re Baths Int'l, Inc.*, 31 B.R. 143, 145 (S.D.N.Y. 1983). This test is premised upon two fundamental policies underlying federal bankruptcy law, equality of distribution and rehabilitation of the debtor's business. *In re Chateaugay Corp.*, 102 B.R. at 354. Here, only a small portion of the contributions to the restored Plans would meet either part of this test. Except for the portion of the contributions attributable to bene-

fits earned by post-petition services, the claims arise from pre-petition service and events and not from any benefit provided to any of the debtors-in-possession in the operation of their businesses in Chapter 11.

Courts have consistently rejected the argument that analogous withdrawal liability under ERISA with respect to multiemployer pension plans is entitled to priority as an administrative expense incurred to preserve the estate, even if the withdrawal occurs and the withdrawal liability becomes payable after commencement of the bankruptcy case. For example, in *Trustees of Amalgamated Insurance Fund v. McFarlin's, Inc.*, the Court of Appeals determined that since the employer's lump sum payment in satisfaction of its withdrawal liability was made to guarantee pension benefits already earned by the employees covered by the plan, the consideration supporting the withdrawal liability was the same as that supporting the pensions themselves—the past, pre-petition labor of the employees covered by the plan. 789 F.2d at 101-03. Therefore, withdrawal liability was not "incurred for the benefit of the estate's creditors," *id.* at 104, and gave rise only to a general unsecured claim. *Id.* at 100, 105. *See also Amalgamated Ins. Fund v. Kessler*, 55 B.R. 735, 740 (S.D.N.Y. 1985) (withdrawal liability is "merely a substitute for the continuing contributions a withdrawing employer would otherwise make toward fully funding vested benefits. [The debtor's] liability for its share . . . of unfunded vested benefits existed long before the start of the Chapter 11 proceeding. Thus, withdrawal liability is not a cost of business activity occurring during the Chapter 11 proceeding"); *In re United Dep't Stores, Inc.*, 49 B.R. 462, 465-66 (S.D.N.Y. 1985) (withdrawal liability is not an actual, necessary cost and expense of preserving the estate); *In re Kessler*, 23 B.R. 722, 723-26 (S.D.N.Y. 1982) (pre-petition services of employees neither confer actual value upon estate nor aid in its preservation), *aff'd*, 55 B.R. 735 (S.D.N.Y. 1985) [14]

In attempting to rebut the Court of Appeals' conclusion that LTV's obligations to the restored Plans would receive "no special priority," the PBGC cites *In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983). Brief for Petitioner at 38. The PBGC's reliance on this case is misplaced; in fact, *Pacific Far East* lends support to the view that the claims should be considered pre-petition claims.

The obligations that were in dispute in *Pacific Far East* had all accrued after the debtor had filed its bankruptcy petition and were directly related to services rendered post-petition. The argument against treating those obligations as administrative expenses was based on the fact that the amounts of the obligations were calculated with reference to hours worked prior to the bankruptcy filing. The court found, however, that those pre-petition hours were merely the "units of measure for the post-filing payments". 713 F.2d at 479.

The Committee does not dispute that the portions of LTV's obligations to the Plans for benefits that were earned by post-petition services are entitled to administrative priority even though the employee's number of years of pre-petition service may be taken into consideration in calculating the amount of the benefit earned. However, the great majority of LTV's obligations to the Plans accrued pre-petition. Thus, even though many of the payments actually came due or will come due (in the event of restoration) post-petition or even post-confirmation, these payments are clearly based on pre-petition obligations. This is no different than LTV's obligations to bondholders who loaned money pre-petition and were not scheduled to be repaid until some time in the future. The

[14] The fact that these cases deal with liabilities resulting from withdrawal from pension plan funding responsibility rather than with restoration liability is irrelevant to the basic issue, which is when the service for which the pension obligations accrued was performed. The only difference is that in the event of restoration, the plans would be ongoing.

critical factor is when the labor or the money was provided to the debtor, not when payment by the debtor was due. *Id.* at 478.

Throughout its papers, the PBGC either states or implies that a finding that the claims of the restored Plans are general unsecured claims will have serious implications for the pension insurance program. Brief for Petitioner at 37. In a different but comparable context, this Court made it clear that however compelling a policy argument the government might present, the equitable distribution principles embedded in the bankruptcy laws cannot be shunted aside except to the extent that Congress expressly so declares:

> The [NLRB] argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether that should be done is a legislative decision. The contest now is no longer between employees and management but between various classes of creditors. The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act... The theme of the Bankruptcy Act is "equality of distribution" (*Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219, 85 L.Ed. 1293, 1298, 61 S.Ct. 904, 907); and if one claimant is to be preferred over others, the purpose should be clear from the statute. We can find in the Bankruptcy Act no warrant for giving these back pay awards any different treatment than other wage claims enjoy.

Nathanson, 344 U.S. at 28-29. *Accord National Labor Relations Bd. v. Martin Arsham Sewing Co.*, 873 F.2d 884, 888 (6th Cir. 1989) (NLRB effort to collect judgment against debtor in bankruptcy from president and sole stockholder of

debtor was rejected since, by such action, NLRB was "indirectly attempting to obtain an impermissible priority over other creditors"); *Equal Employment Opportunity Comm'n v. Rath Packing Co.*, 787 F.2d 318, 327 (8th Cir.) ("payment of EEOC claim, a pre-petition unsecured claim, may not be given preference over the claims of other creditors"), *cert. denied*, 479 U.S. 910 (1986).

Moreover, under the Bankruptcy Reform Act of 1978, Congress amended the federal statute which had given the federal government, as creditor, priority status, so that it no longer applies in Bankruptcy Code cases. *See* 31 U.S.C. §3713; H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6179.

In fact, Congress has specifically considered the issue and expressly provided a limited priority for claims arising out of pension plan liabilities. Section 507(a)(4) of the Bankruptcy Code (which section is applicable in both Chapter 11 and Chapter 7) gives a priority to certain "allowed unsecured claims for contributions to an employee benefit plan..." This priority is limited, however, to claims arising within 180 days before the date of the filing of the petition. The Bankruptcy Code further limits the amount of the priority that can be accorded under Section 507(a)(4) and Section 507(a)(3), which gives a priority to claims for wages earned within 90 days before the bankruptcy filing, to $2,000 per employee.[15] The fact that Congress has expressly granted priority status for certain pension claims is further evidence that Congress did not intend for claims such as those at issue here to have priority status.

In making its restoration decision involving the Plans sponsored by LTV, a Chapter 11 debtor, the PBGC should have considered the level of recovery likely to be realized by the restored Plans on their claims in order to assess their viabil-

[15] LTV has already made numerous payments in respect of the priorities provided under Bankruptcy Code Sections 507(a)(3) and (a)(4), and those payments more than offset in full any claim of priority that the restored Plans might otherwise have.

ity. In doing so, the PBGC should have recognized that the great majority of the liabilities of LTV to the Plans—including all amounts, whenever they would have become payable under ERISA, relating to pre-petition services, and related actuarial changes, experience adjustments and waivers—are pre-petition general unsecured claims and can be permanently discharged pursuant to a Chapter 11 plan of reorganization even though the restored Plans may receive substantially less than full payment.[16] Unless the restored Plans can survive the inevitable shortfall in payment on their claims, they cannot reasonably be considered viable.

III. THE PBGC'S FAILURE TO GIVE ADEQUATE CONSIDERATION TO THE BANKRUPTCY AND LABOR LAW IMPLICATIONS OF ITS RESTORATION DECISION WAS ARBITRARY AND CAPRICIOUS.

In reaching its decision to restore the terminated Plans, the PBGC completely ignored the competing policies and goals served by bankruptcy and labor law—policies and goals correctly considered by the Court of Appeals. The PBGC's failure to consider the circumstances of a debtor attempting to reorganize and, at the same time, seeking to comply with its legally mandated collective bargaining obligations renders the PBGC's restoration decision arbitrary and capricious.

Since an analysis of LTV's financial condition involves competing policies of federal bankruptcy and labor laws and, thus, implicates national policy beyond the PBGC's area of expertise, the PBGC's affordability theory as applied to this case is not entitled to any deference. *Department of the Navy v. Federal Labor Relations Auth.*, 836 F.2d 1409, 1410 (3d Cir. 1988) ("an agency decision is not entitled to such deference when it interprets another agency's statute or resolves a conflict between its own statute and the statute of another agency"); *Parola v. Weinberger*, 848 F.2d 956, 959-60 (9th Cir. 1988); *State of Nebraska Military Dep't v. Federal Labor Relations Auth.*, 705 F.2d 945, 948 (8th Cir. 1983); *Division of Military & Naval Affairs v. Federal Labor Relations Auth.*, 683 F.2d 45, 48 (2d Cir. 1982), *cert. denied*, 464 U.S. 1007 (1983); *Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981) (Secretary of HEW's construction of agency regulations "is not entitled to special deference to the extent that it rests on the interpretation of another agency's statutes and regulations.").

[16] This does not mean that it is impossible for a Chapter 11 debtor—even an insolvent one—to emerge from Chapter 11 with its defined benefit plans intact. If the parties in interest in a Chapter 11 case conclude that it is desirable to have the plans survive the Chapter 11 case, the funding deficiencies which would otherwise occur by reason of the discharge of and discounted payment on the claims of the plans can be avoided by either leaving the claims unimpaired under the plan of reorganization or excluding such claims from discharge in the plan of reorganization or the order confirming the plan of reorganization. *See* 11 U.S.C. §§1124, 1141(d). Given the substantial insolvency of LTV and the enormous impact of the PBGC's claims, it is inconceivable that the parties would agree to such treatment of the claims of the Plans here.

As the Court of Appeals correctly recognized, "[a]lthough this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." Pet. App. 16a. The PBGC, however, not only failed to balance these competing statutory schemes but ignored them completely. The PBGC ignored LTV's status as a debtor and its efforts to reorganize and survive as a viable company. As the Court of Appeals stated:

> The purpose of a Chapter 11 reorganization under the Bankruptcy Code "is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6179.

Pet. App. 15a.

Congressional support for reorganizations and its recognition of the importance of the protections afforded a debtor attempting to reorganize cannot be disputed. *See, e.g., Con-*

tinental Illinois Nat'l Bank & Trust Co. v. Chicago Rock Island & Pacific Ry. Co., 294 U.S. 648, 676 (1935). The two policies served by reorganization are the fresh start given to a debtor and the fair and equitable distribution of the debtor's assets to its creditors. *Continental Illinois Nat'l Bank & Trust Co., supra; see also National Labor Relations Bd. v. Bildisco & Bildisco*, 465 U.S. 512, 528 (1984); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 202 (1983).

Similarly, since the post-termination pension arrangements were negotiated through collective bargaining between LTV and the USWA, the Court of Appeals also recognized that the PBGC should have considered labor law as well as bankruptcy law and ERISA:

> A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (citation omitted).

Pet. App. 15a-16a.

The PBGC, however, contends that it properly ignored the policies underlying bankruptcy and labor law since "[w]hatever the validity of this technique of judicial review in other contexts, it is inapplicable here by virtue of the plain language of Section 4047." Brief for Petitioner at 40. The PBGC's assertion that it has no authority to consider competing federal policies is inconsistent with its claim that it is entitled to the deference it seeks; if the PBGC is incapable or unwilling to consider bankruptcy and labor law in a case such as this, it is obvious that the reviewing Court is the proper authority to consider the competing federal policies, without giving undue weight to the PBGC's narrow and parochial viewpoint.

The PBGC's position is defective on numerous counts. First, the PBGC ignores Section 514(d) of ERISA which "explicitly states that '[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States (except as provided in Sections 1031 and 1137(c) of this title [Sections 111 and 507(c) of ERISA]) or any rule or regulation issued under any such law.'" 29 U.S.C. §1144(d); Pet. App. 16a. Thus, the Court of Appeals required that "the policies and goals of ERISA must be accommodated along with those of bankruptcy and labor law." Pet. App. 16a. This accommodation is precisely what the PBGC failed to perform in examining the financial circumstances of LTV.

Moreover, the PBGC's position fails to take into account Section 1113 of the Bankruptcy Code. Enacted in response to this Court's ruling in *Bildisco, supra*, Section 1113 sets forth the procedural and substantive requirements for amendment of collective bargaining agreements during a Chapter 11 case. It has consistently been recognized that Section 1113 "is meant to encourage collective bargaining." *In re Century Brass Prods., Inc.*, 795 F.2d 265, 273 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). Pursuant to this section, a debtor must negotiate in good faith over any proposed modification of a labor contract. *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 89 (2d Cir. 1987).

LTV recognized its statutory obligations under Section 1113 and negotiated in good faith with the USWA over, among other things, the subject of pension benefits. Absent these negotiations, and the eventual implementation of the post-termination pension arrangements, a strike could have utterly destroyed LTV's reorganization efforts. Thus, in addition to alleviating the hardship caused to LTV's employees and retirees, the post-termination pension arrangements comported with both bankruptcy law, by permitting LTV to reorganize, and labor law, by preserving labor-management peace.

The PBGC's assertion that the Court of Appeals' holding might require an agency's decision to be invalidated if there exists an "arguably relevant statutory policy that was not considered," is a strained interpretation of the decision and is utterly unpersuasive in this situation. The bankruptcy and labor law implications of restoration in this case are more than just "arguably relevant"—they are crucial to any realistic analysis of LTV's status, financial condition and prospects. Nor are the effects of restoration on these bankruptcy and labor law concerns merely speculative and tangential—they are direct, readily foreseeable and devastating. To accept the PBGC's argument that it could take whatever action it deemed appropriate without any regard for LTV's relationships with the rest of the world and its obligations under other federal laws would result in an obvious abuse of the PBGC's discretion. The Court of Appeals thus properly held that the PBGC's failure to consider bankruptcy law and labor law, along with their underlying policies, in deciding to restore the terminated Plans rendered the PBGC's decision arbitrary and capricious.

CONCLUSION

The decision of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted,

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January 16, 1990

(22)

No. 89-390

In the Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, OFFICIAL PARENT CREDITORS' COMMITTEE OF THE LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, and WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT OFFICIAL PARENT CREDITORS' COMMITTEE OF THE LTV CORPORATION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

This case involves an attempt by the Pension Benefit Guaranty Corporation ("PBGC") to restore $2.3 billion in pension plan funding obligations to a debtor in the process of reorganizing under Chapter 11 of the Bankruptcy Code and presents the following questions involving the intersection of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Bankruptcy Code:

1. Where the sponsor of a pension plan involuntarily terminated by the PBGC is a debtor reorganizing under Chapter 11, may the PBGC determine to restore the pension plan based on nothing more than

(a) application of a *per se* rule fashioned by the PBGC, but not authorized by ERISA, under which it considers all follow-on plans as "abusive" of the pension system, mandating restoration of a terminated plan without regard to the financial condition of the sponsoring employer and without regard to the impact of restoration upon the plan sponsor's ability to reorganize; and

(b) a determination, unsupported by the administrative record, that a plan sponsor's financial condition had improved sufficiently to warrant restoration of the pension funding obligations?

2. When the PBGC determines, under §4047 of ERISA, to restore a pension plan sponsored by a debtor reorganizing under Chapter 11, does the PBGC have the power to effectuate that restoration without consideration by a court to ensure that restoration is properly harmonized with the policies of the Bankruptcy Code in light of

(a) the clear Congressional expression in ERISA §4041 that pension plan status be determined and provided for in the reorganization plan and that pension plans continue unless a company cannot successfully reorganize absent termination;

(b) the clear Congressional expression in §§514(d) and 4041(c)(2)(B)(ii) of ERISA and §§1123 and 1142 of the Bankruptcy Code, that in the context of a reorganization, the bankruptcy policy favoring rehabilitation and reorganization of the debtor remains paramount to other concerns;

(c) the fact that the PBGC's authority and expertise are limited to the federal pension laws and do not extend to bankruptcy law; and

(d) the fact that the PBGC lacks the power to nullify a prior district court pension plan termination order?

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OCTOBER TERM, 1989

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v.

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Respondents.

BRIEF FOR RESPONDENT OFFICIAL PARENT CREDITORS' COMMITTEE OF THE LTV CORPORATION

This brief is filed on behalf of respondent the Official Parent Creditors' Committee of The LTV Corporation ("Parent Creditors' Committee"). The Parent Creditors' Committee is the official committee of creditors of The LTV Corporation, the parent of LTV Steel Company, Inc. ("LTV Steel"). LTV Steel is the sponsor of the three defined benefit pension plans (the "Plans"), which are at issue in this case. The Parent Creditors' Committee represents creditors of The LTV Corporation and includes indenture trustees who represent holders of over $1 billion in publicly-held debt.

The Parent Creditors' Committee believes that restoration of these three Plans may ultimately be required and, if so, that the Debtors should be reorganized according to a plan of reorganization that provides for the continuation of the Plans after confirmation. However, the Parent Creditors' Committee also contends that the courts below were correct in holding that this result cannot be achieved based on the administrative record before this Court. Instead, the Parent Creditors' Committee respectfully suggests that this matter must be remanded to the Pension Benefit Guaranty Corporation (the "PBGC"). If, after remand and on an adequate administrative record, the PBGC again determines that restoration is warranted, the effect of restoration on the Debtors' ability to reorganize must be considered, in a second step, by the appropriate court before any restoration determination can be implemented.

COUNTER-STATEMENT OF THE CASE[1]

This case arises out of bankruptcy reorganization proceedings under Chapter 11 of the Bankruptcy Code, filed in the United States District Court for the Southern District of New York. The decision of the Court of Appeals for the Second

[1] References to the Appendix to the Petition for a Writ of Certiorari filed by the PBGC are denoted as "Pet. App.__ a". References to the Joint Appendix are denoted as "JA__". References to the Brief of Petitioner, Pension Benefit Guaranty Corporation, are denoted as "PBGC Br.__." References to the Brief of the United States as *Amicus Curiae* are denoted as "U.S. Br.__." References to the administrative record of the PBGC's restoration decision, contained as exhibits in the joint appendix filed in the court of appeals, which are not contained in the Joint Appendix here, are denoted as "AR __."

Circuit under review here involves the disposition of approximately $2.3 billion in unfunded pension benefit obligations owed to present and former employees of LTV Steel and its predecessor steel companies under several defined benefit pension plans.[2]

A. The Debtors.

The LTV Corporation ("LTV Corp.") directly and indirectly holds all, or a portion of, the issued and outstanding stock of a number of subsidiaries, including LTV Steel. As a result of significant operating losses sustained by LTV Steel and mounting pension obligations that LTV Steel owed to its current and former employees, LTV Corp. and sixty-six of its subsidiaries (the "Debtors"), including LTV Steel, filed voluntary Chapter 11 petitions under the Bankruptcy Code in July and August 1986. Pet. App. 37a. Although these bankruptcy reorganization cases are being jointly administered in the United States Bankruptcy Court for the Southern District of New York by the Honorable Burton R. Lifland, Chief Judge, these 67 separate cases have not been substantively consolidated. *See* Fed. R. Bankr. P. 1015(b).

Since the filing of the petitions, the Debtors have enjoyed the exclusive right to file plans of reorganization pursuant to 11 U.S.C. §1121(b). Eleven orders entered by the bankruptcy court, under 11 U.S.C. §1121(d), have extended the initial 120-day period of exclusivity. Throughout the period of exclusivity, as extended, the Debtors have

[2] LTV Steel was created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation. Pet. App. 36a.

been unable to formulate a plan of reorganization that has attracted sufficient support to warrant solicitation for a vote on creditor and equity holder acceptance. Consequently, no plans of reorganization have been filed. A major impediment to formulation of an acceptable plan has been the uncertainty concerning LTV Steel's unfunded pension obligations.

B. The Bankruptcy Cases And The Creditor Constituencies.

In these bankruptcy reorganization cases, the interests of creditors of the parent, LTV Corp., have diverged in many respects from the interests of creditors of the subsidiary, LTV Steel. In particular, the parent creditors have differed from the steel creditors in their position with respect to the PBGC's determination to restore three of LTV Steel's pension plans – the issue before this Court. Initially, a single creditors' committee was appointed for all of the cases, representing, *inter alia*, trade, labor, publicly-held debt, utility and insurance company interests. Recognizing the diverging interests among the various creditors, the bankruptcy court by Order dated December 23, 1988, approved a Stipulation among the Official Committee of Unsecured Creditors, a subcommittee of Parent Creditors within that Official Committee, and the Debtors, bifurcating the single Committee into an official Parent Creditors' Committee and an official Steel Creditors' Committee.[3]

[3] The Official Committee of Unsecured Creditors, as designated in the caption, now represents only the interests of the creditors of LTV Steel and certain steel affiliates.

In addition to the Parent Creditors' Committee, four other major creditor constituencies in these Chapter 11 cases are also parties to this proceeding: (1) the Steel Creditors' Committee, which represents creditors of the subsidiary that is the plan sponsor, LTV Steel; (2) the Equity Security Holders' Committee, which represents the equity security holders of LTV Corp.; (3) the LTV Bank Group, which holds the majority of the debt (approximately $250 million) at LTV Aerospace & Defense Company, another subsidiary of LTV Corp.; and (4) the PBGC, which has asserted a termination liability claim in excess of $2 billion in each of the 67 bankruptcy cases. The PBGC is a wholly-owned United States government corporation that was established in §4002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1302, to insure pension benefits under terminated pension plans and to administer the provisions of Title IV of ERISA, which creates a pension plan termination insurance system.

In multi-debtor bankruptcy reorganization cases, a particular aspect of a reorganization plan may have a different impact upon one debtor than upon another, and therefore may have a different impact upon their respective creditors. Restoration of LTV Steel's pension plans, and the potentially disparate impact of the "joint and several liability" provisions of ERISA, as amended, provides an example. In May 1988, after the PBGC had instituted this enforcement action, the Debtors submitted to the major constituencies a plan of reorganization proposal which completely ignored

PBGC's determination to restore LTV Steel's pension plans. The Steel Creditors' Committee has supported the Debtors' reorganization proposal. The Parent Creditors' Committee has rejected that proposal. Thereafter, the Parent Creditors' Committee submitted to the Debtors and to the Steel Creditors' Committee a separate plan of reorganization proposal. The touchstone of the Parent Creditors' Committee's proposal is the restoration of the pension plans on an affordable basis to permit LTV Steel to fund necessary contributions to the Plans.

Pension-related issues aside, considerable activity in the bankruptcy reorganization cases continues under the careful supervision of the bankruptcy judge while this proceeding has progressed. No trustee having been appointed, the Debtors, as debtors-in-possession, have continued to operate their businesses. *See* 11 U.S.C. §§1107, 1108. The Debtors, and most notably LTV Steel, have continued their business plan to rationalize and dispose of excess and unprofitable businesses, operations, and assets, under the supervision of the bankruptcy judge, who has been involved with these cases continuously since the bankruptcy filings and their automatic referral. *See* 28 U.S.C. §157(a). Indeed, since these cases were filed and as of September 30, 1989, the Debtors have on a consolidated basis accumulated and invested approximately $1 billion in cash or cash equivalents—approximately $240 million more than they had on September 30, 1988.

Moreover, the Debtors have continued the effort to resolve or litigate before the bankruptcy

judge the many disputes that have arisen affecting the property of the estate (11 U.S.C. §541) and its turnover (11 U.S.C. §542); requests for relief from the automatic stay (11 U.S.C. §362); the imposition of liens, including statutory liens (11 U.S.C. §§544, 545) and adequate protection to lienholders (11 U.S.C. §361); the use, sale, or leasing of property (11 U.S.C. §363); the disposition of executory contracts and obligations thereunder (11 U.S.C. §365); and objections to proofs of claim filed in these cases (11 U.S.C. §§501-503, 506, 1111).

The bankruptcy judge has supervised extensive activity relating to disputed and settled claims against the Debtors. According to the Debtors, initially 37,267 proofs of claim amounting to billions of dollars were filed. After subtracting excess multi-case claims (including those of the PBGC for termination liability), and settled, withdrawn, overlapping, and duplicative claims, 10,431 claims are in agreement, and 9,748 claims remain in active discussion or litigation.

The bankruptcy judge has also exercised his broad equitable powers to protect the parties' competing interests and to foster a process and environment conducive to the negotiation of a consensual plan of reorganization. Thus, in several instances, the bankruptcy judge has entered orders enjoining lawsuits in other forums and directing actions to be taken or not taken. The bankruptcy judge has dealt with many issues that have arisen that may affect the reorganization effort and the rehabilitation of the Debtors in order to preserve the Debtors' estates for a distribution to creditors in accordance with and subject to the

priorities established by Congress in the Bankruptcy Code. The bankruptcy court has entered, *inter alia*, two significant interim orders to preserve the Debtors' estates, utilizing the mechanism of 11 U.S.C. 105(a)[4] and the bankruptcy court's inherent equitable powers. By order entered July 30, 1986, the bankruptcy judge authorized LTV Steel to restore retiree health and life insurance benefits of up to $70 million for a six-month period to "reduce the threat to the reorganization posed by [a labor] strike." *In re Chateaugay Corp.*, 64 Bankr. 990, 996 (S.D.N.Y. 1986). *See* Pet. App. 46a. The bankruptcy court also permitted LTV Steel in April 1987, after the PBGC terminated the Plans, to make "a single hardship payment to each retiree at a cost of $6.7 million" in response to the adversary proceeding initiated by the United Steel Workers of America seeking to compel payment of full pension benefits. Pet. App. 43a-44a.

C. The District Court's January 12, 1987 Orders Relating To Involuntary Termination Of Three LTV Steel Pension Plans.

On January 12, 1987, six months after the Debtors' bankruptcy petitions were filed, the PBGC elected to start proceedings to terminate three defined benefit pension plans for which LTV Steel was the sponsoring employer. Pet. App. 7a.[5]

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[4] Section 105(a) of the Bankruptcy Code provides, in part, that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

[5] Under ERISA §§4041 and 4042, 29 U.S.C. §§1341 and 1342, an employer may terminate a pension plan "voluntarily" or the PBGC may take action to terminate a plan "involuntarily". Voluntary

At that time, the PBGC advocated termination of the plans for the purpose of "avoid[ing] an unreasonable deterioration of the plans' financial condition or an unreasonable increase in the liability of the PBGC's insurance funds." Memorandum In Support Of PBGC's Motion For Summary Judgment On Its Complaint, at 10; Pet. App. 41a-42a; JA 313. LTV Corp. and LTV Steel consented to the involuntary terminations. JA 141-42. The district court's January 12, 1987 consent orders terminated the Plans as of January 13, 1987. JA 141-42. The PBGC estimates the underfunding of the Plans, as of the date of termination, at $2.3 billion. PBGC Br. at 8.

Pursuant to the terms of ERISA, the PBGC assumed its statutory duty to pay certain guaranteed benefits to plan participants. Pet. App. 7a.[6] ERISA authorized the PBGC to assert claims against LTV Steel and its "controlled group of corporations" (including LTV Corp.) for 75% of the unfunded guaranteed benefits.[7] Accordingly, the

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terminations are either "standard", where the assets of the plan are sufficient to pay all benefit commitments, or "distress", where the assets are insufficient to pay all benefits. *See* 29 U.S.C. §1341. The PBGC may start proceedings to terminate a plan under a variety of circumstances, including situations where plan assets are insufficient, where the employer fails to make minimum funding contributions, where the PBGC may sustain a long-run loss, or where the plan will be unable to pay the defined benefits when they become due. *See* 29 U.S.C. §1342.

[6] "Guaranteed benefits" refers to the level of benefits guaranteed by the PBGC. *See* ERISA, §4022, 29 U.S.C. §1322. To the extent that a plan promises benefits in excess of guaranteed amounts, employees may lose a portion of their benefits upon termination. PBGC Br. at 5-6; Pet. App. 7a.

[7] *See* ERISA §§4062(a) and (b), 29 U.S.C. §§1362(a) and (b), as amended by the Single Employer Pension Plan Amendments of 1986 ("SEPPAA"), Pub. L. No. 99-272, Title XI, 100 Stat. 268,

PBGC filed proofs of claim exceeding $2 billion in each of the 67 bankruptcy reorganization cases on the theory that each debtor was jointly and severally liable for the full termination liability.

By filing these proofs of claim, the PBGC became the largest single creditor in these bankruptcy reorganization cases. JA 138, 337.

D. The PBGC's Determination To Restore The Plans.

Seven months later, on September 22, 1987, without proceeding further in the district court which had entered the termination order, the PBGC issued a Notice of Restoration in which it purported to return to LTV Steel the $2.3 billion in pension benefit obligations under the Plans. Pet. App. 182-83a.

This Notice of Restoration – the first such Notice the PBGC had ever issued – stated:

NOTES *(Continued)*

§11011(a), 29 U.S.C. §§1362(a) and (b) (Supp. IV 1986). These sections impose joint and several termination liability on members of a sponsoring employer's "controlled group" of corporations. The determination of which corporations are included in the "controlled group" depends on a calculation of ownership percentages taken from §1563(a) of the Internal Revenue Code, 26 U.S.C. §1563(a). *See* ERISA §4001(a)(14), 29 U.S.C. §1301(a)(14). In 1987, Congress amended ERISA to eliminate the 75% cap that existed under previous law on the liability of a sponsoring employer and its controlled group upon termination of a pension plan covered under the statute. *See* The Pension Protection Act of 1987 ("PPA"), Pub. L. No. 100-203, Title IX, subtitle D, part II, 101 Stat. 1330-333 (1987). With respect to plans that terminate *after* December 17, 1987, ERISA provides that the PBGC may assert a termination liability claim against a plan sponsor and its controlled group for the total amount of the unfunded benefit liabilities, without regard to any cap. *See* ERISA §§4062(a) and (b), as amended by the PPA, 29 U.S.C. §§1362(a) and (b) (West Supp. 1988).

Please take notice that the Pension Benefit Guaranty Corporation (the "PBGC") has determined, pursuant to Section 4047 of the Employment Retirement Income Security Act of 1974, as amended ("ERISA"), that it is appropriate and consistent with PBGC's duties under Title IV of ERISA to restore to pretermination status the Jones & Laughlin Hourly Pension Plan, the Jones & Laughlin Retirement Plan and Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (the "Plans"). *This determination is based on three factors: LTV Steel's establishment, after the termination of the Plans, of a retirement program that results in an abuse of the pension plan termination insurance system established by Title IV of ERISA; LTV Steel's improved financial circumstances; and LTV Steel's demonstrated willingness to fund employee retirement arrangements.*

The Plans are hereby restored, effective immediately, to their pretermination status as of January 13, 1987. This means that the Plans are ongoing since that date for all purposes, including accruing of benefits, vesting, and minimum funding obligations. Benefit payments to retirees that were reduced because of the terminations shall be restored to their full amounts under the terms of the Plans, and the Plans shall pay to such retirees any amounts that were not paid because of the terminations, together with interest at the rate specified in 29 C.F.R. §2623.11(d).

Payments to retirees may not be delayed or withheld as a result of restoration. The Plans

currently have sufficient cash to make the next five scheduled benefit payments without liquidation of assets.

Also effective immediately, The LTV Corporation is plan administrator of the restored Plans with all of the fiduciary duties and obligations of a plan administrator under ERISA and under the terms of the Plans.

This determination is effective on the date and at the time it is issued and is not subject to administrative review by the PBGC under 29 C.F.R. Part 2606.

Id. (Emphasis added)[8]

The Debtors refused to accept the restoration. The PBGC then instituted an action in the United States District Court for the Southern District of New York to enforce restoration, relying upon §4003 of ERISA, 29 U.S.C. §1303. Pet. App. 9a.

E. The District Court Decision.

By opinion dated June 22, 1988, the district court vacated the PBGC's Notice of Restoration and remanded the case to the PBGC. Pet. App. 28a-131a. The court held that the administrative record "[did] not support the PBGC's decision to restore the Plans on any of the asserted grounds." Pet. App. 35a. The court also held that there was "no factual or legal basis for the PBGC's finding that LTV has abused the pension termination insurance program." *Id.* The district court stated that the record "is not sufficiently developed to

[8] Emphasis supplied throughout unless otherwise indicated.

permit a finding that LTV Steel's financial condition has improved to the point where it can afford to sponsor its previously terminated plans." *Id.*

Applying the standard of review prescribed in the Administrative Procedures Act ("APA"), 5 U.S.C. §706(2)(A), the district court held that the PBGC's determination to restore the three pension plans was arbitrary and capricious. Pet. App. 82a-85a. The court concluded that Congress did not intend restoration to be used as a weapon to retaliate against an employer that institutes a post-termination replacement benefit plan. Pet. App. 90a-110a.

The court also held that the PBGC's determination that LTV Steel's interim collective bargaining agreement, which established several new so-called "follow-on" pension plans[9] for employees of LTV Steel, was "abusive" could not be sustained because it failed to take into consideration the competing policies of the Bankruptcy Code and the federal labor laws. Pet. App. 110a. Noting that the record did not fully support the PBGC's statement that LTV Steel's financial performance had truly been a factor in the restoration determination, the district court held that the administrative record nonetheless did not support a conclusion that LTV Steel's financial condition had improved substantially enough to allow it to afford restoration. Pet. App. 110a-118a. Finally, the district court found the PBGC's restoration procedures inadequate because of "the PBGC's failure to develop a complete,

[9] A "follow-on" pension plan is a pension plan established by an employer after the termination of a pre-existing pension plan, where the new plan replaces at least some of the benefits lost by employees by reason of the plan termination.

reviewable record, its failure adequately to apprise LTV of the grounds for restoration and its failure to give LTV adequate opportunity to rebut those grounds." Pet. App. 123a.

F. The Court Of Appeals Decision.

The Court of Appeals for the Second Circuit affirmed, agreeing with the district court's conclusion that the PBGC's restoration determination was arbitrary and capricious. Pet. App. 14a-17a.

Relying on this Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), holding that an agency must consider "all relevant factors," the court held that "[b]ecause ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of law, and, to the extent possible, honored the policies underlying them." Pet. App. 14a-15a. It concluded that the PBGC had not "adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other." Pet. App. 17a. Rather, PBGC "focused inordinately on ERISA." *Id.*

Alternatively, the court held that the PBGC's analysis under ERISA, without regard to competing federal policies, was "insupportable as a matter of law." *Id.* First, the court found no support for the PBGC's adoption of a *per se* rule that the establishment of a follow-on plan by itself is a sufficient basis for restoration, noting that Congress was consistent in its refusal to include in ERISA proposed provisions outlawing follow-on plans. Pet. App. 17a-20a. The court of appeals also

agreed with the district court that the PBGC's assessment of LTV Steel's improved financial condition was seriously flawed and could not support restoration. Pet. App. 21a-25a. Finally, the court of appeals agreed that the PBGC utilized inadequate procedures.

The court of appeals remanded to the PBGC, explaining that "[o]n remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the district court and to us, its decision cannot be upheld." Pet. App. 27a.

G. The Impact Of Restoration.

The status of the three Plans – terminated or restored – and the disposition of approximately $2.3 billion in unfunded pension benefit obligations affects all creditors of LTV Corp. and LTV Steel, as well as creditors of all the other Debtors. Assuming LTV Steel could afford to fund restored Plans while it and the other members of its controlled group successfully reorganize, the goals both of ERISA and of the federal bankruptcy laws would be achievable. However, an improvident restoration – one in which the impact of LTV Steel's funding obligations on the prospects of reorganization of all of the Debtors has not been properly evaluated – could well lead to imminent retermination of the Plans and the liquidation of all Debtors. Liquidation would frustrate the goals of ERISA, the Bankruptcy Code and the labor laws.

Retermination of the Plans could also have a drastic, adverse effect on all creditors in these bankruptcy reorganization cases. The 1987 amendments to the pension laws increased the

joint and several liability of terminated plan sponsors and their controlled group of corporations (which here includes the parent, LTV Corp. and LTV Aerospace & Defense Company), from 75% of unfunded guaranteed benefits to 100% of benefit liabilities. *Compare* SEPPAA, §11011(a), amending ERISA §4062(b), 29 U.S.C.A. §1362(b)(1)(A) (Supp. IV 1986) with the PPA, amending ERISA §4062(b), 29 U.S.C.A. §1362(b)(1)(A) (West. Supp. 1988). Were the PBGC to reterminate these pension plans, or were the bankruptcy court to approve a voluntary distress termination after the restoration, the PBGC might seek to increase its claim to 100% of the unfunded benefit liabilities. If the court found that the new law applied, the PBGC's claim would be increased by approximately $800 million. Pet. App. 121a. Although the Plans in question are sponsored by LTV Steel – not LTV Corp. – the prospects of recovery by parent creditors may be seriously affected by the provisions in ERISA that provide for "joint and several" liability of members of the controlled group on a termination claim.[10]

A decision by this Court as to the status of the Plans affects the interests of all LTV Corp.'s and LTV Steel's creditors, but that decision may affect each creditor constituency differently.

[10] In the bankruptcy court, the Parent Creditors' Committee objected to the PBGC's claims. These objections, which are still pending, raise the issue whether such full controlled group liability on the parent LTV Corp. violates the constitutional rights of LTV Corp. and its creditors.

SUMMARY OF ARGUMENT

1. The administrative record does not support the PBGC's Notice of Restoration of the Plans, and the courts below correctly vacated the PBGC's Notice and remanded the matter to the PBGC for further development of the factual record. An employer's adoption of a follow-on plan does not automatically justify restoration by the PBGC of a terminated plan. Congress carefully considered and explicitly rejected a proposed statutory prohibition against follow-on plans, and withheld from the PBGC the power to adopt such a "per se" rule and to use retaliatory restoration to deter this supposed "abuse" of the pension insurance program. Moreover, the courts below were correct in concluding that the PBGC's optimistic assessment of LTV Steel's financial condition was not based on an adequately-developed administrative record.

2. On remand to the PBGC, however, the PBGC should confine its consideration exclusively to the issues under ERISA involved in restoration. When the sponsor of a terminated pension plan is a debtor in the process of reorganization under Chapter 11 of the Bankruptcy Code, and pension plan obligations are a part of a collective bargaining agreement governed by the federal labor laws, the decision to give effect to restoration of the pension plan requires careful consideration by a tribunal that is familiar with the delicate and complex process of bankruptcy reorganization, of the competing and often inconsistent policies of ERISA and the purposes and mechanics of reorganization under the Bankruptcy Code.

The PBGC has neither the statutory authority nor the expertise to apply ERISA in a fashion that properly effectuates the competing, non-ERISA federal policies. On the contrary, even in the context of a Chapter 11 bankruptcy case, the PBGC may "determine" to restore solely according to ERISA standards.

The Parent Creditors' Committee concurs with the Solicitor General's suggestion that the PBGC lacks statutory authority to evaluate non-ERISA concerns in making a restoration determination. U.S. Br. at 13, 20. Therefore, in the context of the bankruptcy reorganization process, the PBGC's determination is neither self-executing, nor conclusive. Only the courts possess the statutory authority and expertise to harmonize the goals of ERISA, the federal bankruptcy laws and the federal labor laws and to give appropriate effect to a restoration determination by the PBGC in the context of a bankruptcy reorganization case under Chapter 11. Moreover, in a case such as this, where the district court has entered an order terminating a pension plan, the PBGC has no authority to undermine and contradict a prior district court termination order by unilaterally ordering restoration. Again, action by the court to vacate the prior order is required fully to implement the PBGC's restoration determination.

3. As both the PBGC and the Solicitor General concede, the standard articulated in ERISA §4041(c)(2)(B)(ii) embodies Congress' statutory harmonization of bankruptcy and ERISA concerns when a Chapter 11 debtor seeks to terminate a pension plan. Here, where the Debtors oppose

restoration and contend that the Plans should remain terminated, the same standard is applicable. Section 4041(c)(2)(B)(ii) expresses Congress' intent that pension plans continue in effect during and "ride through" the bankruptcy reorganization whenever possible. Only if the court finds that the restored pension plan obligations cannot be made a part of any successful reorganization plan, *i.e.*, one which will allow the debtors to pay their debts as restructured by and pursuant to a plan of reorganization and continue in business outside the Chapter 11 reorganization process, should a previously terminated pension plan remain terminated. Conversely, if there is a confirmable plan of reorganization that contemplates restoring the pension plans, and the PBGC, in compliance with ERISA guidelines, determines to restore, the court must confirm that plan over an alternative plan that does not provide for restoration.

I. THE COURTS BELOW CORRECTLY VACATED THE PBGC'S RESTORATION DETERMINATION.

Applying the standard set forth in the APA, 5 U.S.C. §706(2)(A),[11] the court of appeals held that

[11] Although the PBGC does not clearly articulate the standard of review it advocates, it cites *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). PBGC Br. at 18. In *Chevron*, which dealt with the deference to be given to an administrative agency's interpretation of a statute when the statutory scheme is ambiguous or silent, the Court stated that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 843-44. The Court said that if the legislative delegation is implicit rather than explicit, "a

the PBGC acted arbitrarily and capriciously in making a determination to restore LTV Steel's three, previously-terminated pension plans. The court concluded that the PBGC acted arbitrarily and capriciously in basing restoration on the fact that LTV Steel's interim labor agreement replaced some of the benefits lost as a result of termination and in fashioning a *per se* rule that replacement of benefits constitutes an "abuse" of ERISA's pension termination insurance program sufficient by itself to justify restoration. The court of appeals also concluded that the PBGC's finding that LTV Steel's and LTV Corp.'s[12] financial condition had improved sufficiently to allow them to fund restoration was unsupported by the administrative record. In addition, the court of appeals based its decision on the PBGC's failure adequately to consider competing federal bankruptcy and labor law policies.

NOTES *(Continued)*

court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Thus, if the agency's interpretation is either arbitrary or capricious or unreasonable, it may be overturned.

In *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1861 n.23 (1989), the Court noted that "the difference between the 'arbitrary and capricious' and 'reasonableness' standards is not of great pragmatic consequence." Accordingly, whether the Court applies the *Chevron* standard or the "arbitrary and capricious" standard under the APA is of little practical significance here.

[12] Although the court of appeals in its opinion referred to LTV Corp. and LTV Steel collectively as "LTV" and the briefs of both the PBGC and the United States in this Court perpetuate this confusion, the separate corporate existence of LTV Corp. and LTV Steel is important to observe in the context of these bankruptcy reorganization cases because of the distinct statutory obligations and the differences in the composition of the creditors of the respective members of the corporate group.

The courts below correctly invalidated the PBGC's Notice of Restoration based on the first two grounds, which, considered together or independently, warrant affirmance of the judgment on review by this Court.

A. The PBGC's Conclusion, That The LTV Steel Interim Collective Bargaining Agreement Was "Per Se" Abusive Of The Pension Termination Insurance Program And Therefore Justified Restoration, Was Unreasonable.

As the PBGC frames the question presented in this case, the issue is whether "a reviewing court [may] foreclose the [PBGC] from considering whether restoration is appropriate to remedy abuse of the federal pension insurance program." PBGC Br. at (i). Clearly, this is not the issue.[13]

[13] Although the PBGC and the United States have also identified as an issue the question whether LTV Steel pension liabilities are "pre-petition debts" enjoying "no special priority," or administrative expenses under 11 U.S.C. §503(b), entitled to first-level priority under 11 U.S.C. §507(a)(1), See PBGC Br. at 37-38, U.S. Br. at 22-23, n.18, and have referred to confusing language in the court of appeals' decision, Pet. App. 23a-24a, this court does not have before it any issue concerning the priority of whatever claims exist or may arise, whether on terminated plans or restored plans. The Parent Creditors' Committee would dispute the Debtors' argument that restoration is meaningless because LTV Steel cannot make contributions while it is in the process of reorganization before confirmation of a plan of reorganization "without an extraordinary court order," *See* Brief for Appellees, the LTV Corporation, The LTV Steel Company, Inc., *et al.* in No. 88-6244 (2d Cir.), pp. 40-41, n. **, and takes issue with the Debtors' refusal in December 1986, to make contributions to the Plans because LTV Steel "is currently in reorganization under Chapter 11 of the Bankruptcy Code." JA 125-126.

Nonetheless, these questions and the many subsidiary issues flowing from them are not properly before this Court. Although these issues are important to bankruptcy administration in these and other cases, the bankruptcy court here has not yet definitively dealt with them. This Court should avoid addressing these issues prematurely before the courts below have had a full opportunity to

Neither the court of appeals nor the district court held that the PBGC was precluded from restoring a pension plan when an "abuse" had occurred. Indeed, if an employer "abuses" the system by shifting to the federal pension insurance program liabilities that the employer can actually afford, the decisions of the courts below would not prevent the PBGC from determining that restoration is appropriate. Moreover, in considering restoration and in evaluating an employer's ability to fund a pension plan, the PBGC is not foreclosed by anything in the decisions of the lower courts in this case from considering the cost of a follow-on plan. The employer's willingness and ability to pay the cost of such a follow-on plan is clearly one relevant fact to consider in determining whether an employer has the financial capability to fund the entire plan in its original form.

Rather, the question presented here is whether PBGC has erroneously fashioned and applied a *per se* rule that whenever a sponsoring employer, after it has terminated a pension plan, adopts a follow-on plan that substantially replaces nonguaranteed benefits, such a follow-on plan constitutes an abuse and whether, under such circumstances, ERISA §4047 confers upon the PBGC the power to restore the original pension plan. *See,*

NOTES *(Continued)*
explore them. However, in view of the confusion engendered by certain language in the court of appeals' opinion, this Court may wish to invite the court of appeals on remand to clarify its discussion of these issues, in which it appears to have blurred the crucial distinction between statutory termination liability claimed by the PBGC and post-petition contributions payable by a sponsoring employer to ongoing pension plans.

e.g., PBGC Br. at 23. Under the PBGC's construction of §4047, the PBGC need consider neither the employer's ability to fund the plan nor any of the other considerations upon which the previous involuntary termination of the plan rested.

The PBGC's unreasonable interpretation of §4047 was properly rejected by both the district court and the court of appeals below.

1. The Courts Below Correctly Rejected As Unreasonable The PBGC's Contention That ERISA §4047 Authorizes Restoration As A Sanction For Adoption Of A Follow-On Plan.

Section 4047 of ERISA provides that the PBGC may "take such actions as may be necessary to restore" a terminated pension plan where the PBGC "determines such action to be appropriate and consistent with its duties" under ERISA.[14]

[14] Section 4047 of ERISA, 29 U.S.C. §1347, provides:

Whenever the corporation determines that a plan which is to be terminated under section 4041 or 4042, or which is in the process of being terminated under section 4041 or 4042, under this subtitle should not be terminated under section 4041 or 4042 as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 4041 or 4042. *In the case of a plan which has been terminated under section 4041 or 4042, the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.*

The duties of the PBGC under ERISA, as enumerated in §4002(a), 29 U.S.C. §1302(a) are:

(1) "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,"

(2) "to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies," and

(3) "to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title."

ERISA also imposes other duties on the PBGC. These include involuntary termination of single-employer pension plans under certain circumstances. ERISA *requires* the PBGC to terminate a plan when "the plan does not have assets available to pay benefits which are currently due under the terms of the plan." *See* ERISA §4042(a), 29 U.S.C. §1342(a). It gives the PBGC the authority to terminate a plan when "the plan will be unable to pay benefits when due" or when "the possible long run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." *Id.*

When it started proceedings to terminate the three Plans at issue in this case, the PBGC found that LTV Steel was unable to meet ERISA's minimum funding standards, that without termination the severe underfunding of the Plans would increase, and that termination was required to

"avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the liability of the PBGC." Pet. App. 42a. *See* PBGC Br. at 9; JA 140; AR 1257, 1384, 1507. Thus the PBGC determined that it is appropriate and consistent with its duties to terminate pension plans under those circumstances.

In light of its own stated reasons for terminating the Plans, the PBGC's contention that restoration is justifiable, without more, simply as a deterrent measure to discourage the establishment of follow-on plans, and particularly without regard to the continued cogency of the original reasons justifying termination, is unfounded. Retaliatory restoration under such circumstances is clearly not "appropriate and consistent with [the PBGC's] duties" under ERISA, which include assuring that funding occurs and that its own liability is minimized.

2. The Legislative History Of ERISA §4047 Refutes The PBGC's Contention That Congress Intended To Entrust The PBGC With The Power To Deter Follow-On Plans With The Sanction Of Restoration.

The legislative history of ERISA §4047 shows that Congress was concerned with the financial ability of employers to fund pension plans. As the court of appeals observed, "Congress' focus in enacting section 4047 was mandating restoration if there was an improvement in financial circumstances." Pet. App. 17a. Congress intended the PBGC to take steps to restore a plan when the employer could afford to fund the terminated plan. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin.

News 5038, 5157-58. In such cases, the original grounds for termination no longer exist. The court of appeals correctly observed that the "legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration." Pet. App. 17a.

As the courts below both correctly observed, Congress only specifically identified the employer's improved financial condition as an appropriate basis for restoration under ERISA. Pet. App. 17a-18a, 93a-100a. Reporting on the original provisions of ERISA in 1974, the House Conference Report states, for example, that the PBGC may cease termination proceedings "if the employer and plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable." H. R. Conf. Rep. No. 1280, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157. According to the House Report, the PBGC may restore a terminated plan "if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent." *Id.* at 5158.

The legislative history of the 1986 amendments to ERISA, which contained technical changes to §4047, likewise confirms that Congress neither intended to permit the PBGC to employ restoration as a weapon to punish employers who "abused" the termination insurance program, nor expressed the view that follow-on plans constituted an abuse. In the House Report on SEPPAA, Congress specifically identified the anticipated abuses of the insurance system which it believed

warranted legislative action and discussed the appropriate protection against such abuses. H. Rep. No. 241, 99th Cong. 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 690-700. Significantly, this crucial piece of the legislative history of §4047 does not so much as identify follow-on plans as an abuse. Nor does it provide any indication that Congress intended to authorize the PBGC to use its power to make a restoration determination to deter any of the abuses it specifically identified.

When Congress addressed the abusive shifting of pension liabilities on the PBGC, it stated that this practice should be remedied through the new "objective criteria for employer distress" and the increase in underfunding liability to the PBGC in §4062(b) above the 30% net worth cap contained in the old law. *Id.* at 690. The House Report states "these provisions will help close the door to abusive claims against the termination insurance program." *Id.* at 690. In fact, in the course of enacting the 1987 amendments to ERISA, Congress specifically considered prohibiting replacement plans, but *declined to do so. See, e.g.,* House Conf. Rep. No. 495, 100th Cong., 1st Sess., *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1626 through 1631.

In 1987, four Congressional committees considered and recommended legislation dealing with Title IV of ERISA. Only the House Ways and Means Committee suggested legislation prohibiting replacement plans. The Ways and Means Committee noted that "*[u]nder present law, an ongoing entity* can continue in operation on a profit making basis after transferring liability to the PBGC and

. . . *may continue or attempt to establish a plan . . . designed to provide the same benefits as the terminated plan less the benefits paid by the PBGC.*" Report of the Committee on the Budget, House of Representatives, to Accompany H. R. 3545, together with Supplemental, Additional, and Minority Views, 100 Cong., 1st Sess. (October 26, 1987), p. 1010. *See* Pet. App. 98a. Its proposal would have prohibited replacement plans following a *voluntary* distress termination and would have allowed the PBGC to bring an enforcement action. Its proposal was rejected.

No committee recommended a prohibition on replacement plans following an *involuntary* termination.

Congress' specific rejection of any prohibition against replacement plans and the Ways and Means Committee's recognition that "current law" permitted follow-on plans both clearly show that Congress did not consider follow-on plans sufficiently abusive to require legislative attention. The court of appeals correctly interpreted Congress' action by concluding that Congress did not intend to permit the PBGC to employ restoration as a weapon to punish an employer for establishing a replacement plan. Under similar circumstances, this Court has found Congress' subsequent legislative inaction "instructive" with respect to the meaning of an existing law. *See Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 837 n.12 (1983). Moreover, although subsequent legislative history may be ambiguous in some circumstances, this Court has suggested that subsequent legislative history may be significant when coupled with a "clear statement as to Congress' view of then existing law." *United States v. Price*, 361 U.S. 304, 312-13 (1960). *See Bradley v. Richmond School Bd.*, 416 U.S. 696, 716 n.23 (1974). Even without such a clear statement, this Court routinely relies on subsequent legislative history as an aid in statutory construction. *See, e.g., Atkins v. Rivera*, 477 U.S. 154, 166 n.10 (1986); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 32-33 (1982).[15] In sum, as the courts below correctly held, the PBGC is free to consider the establishment of follow-on plans as one factor in determining whether restoration is appropriate under ERISA §4047. However, it is evidence only of a plan sponsor's financial ability to maintain the plan as a whole, not of "abusive" behavior that alone warrants restoration.[16]

[15] The PBGC's contention that its "policy" that restoration would result from "abusive" follow-on plans was widely known, and therefore must have been considered and implicitly endorsed by Congress, is unfounded. This "policy" was included in three opinion letters concerning *voluntary* terminations. No such policy had ever been articulated with respect to *involuntary* terminations such as this one, and, until this occasion, the PBGC had never pursued restoration based on the establishment of a follow-on plan. Obviously, under these circumstances, Congress could not be presumed to have known and approved of this policy.

[16] It is an abuse for a plan sponsor to terminate a pension plan, thereby shifting the obligations thereunder to the PBGC, when the sponsor has the financial capability to maintain the plan. The government suggests that employers can "force" the PBGC to involuntarily terminate plans by refusing to make contributions. U.S. Br. at 22. However, the government should not, and need not, allow a sponsoring employer to *force* an involuntary termination. In a case such as this, where LTV Corp. and LTV Steel stated that they would no longer fund the plans (JA 125-126), the government has an adequate remedy short of involuntary termination by the PBGC. If the government believes a sponsoring employer can afford to fund a

B. The PBGC's Conclusion That The Financial Condition Of LTV Corp. And LTV Steel Had Improved Substantially Enough To Enable Them To Afford To Fund The Plans Was Not Adequately Supported By The Administrative Record

It is not disputed that actual improvement in financial circumstances, showing that a plan sponsor can afford to maintain and fund a plan, may justify restoration. Indeed, on a fully-developed record, the PBGC may find that the financial grounds for termination in this case no longer exist and that restoration is warranted based on the financial condition of LTV Steel.

The PBGC's reliance on the improved financial condition of LTV Corp. and LTV Steel in this case, however, was misplaced. Given the PBGC's statement of the questions presented in this case, and in view of the PBGC's administrative record, it appears that the PBGC would have restored the Plans solely because the employer established the follow-on plans, and without regard to improved financial condition.[17]

NOTES *(Continued)*

plan, the Secretary of Labor may initiate an action under ERISA §502, 29 U.S.C. §1132 to *compel* funding of a plan. That would have been a more appropriate and less disruptive approach here, in light of LTV Steel's faulty legal conclusion that the bankruptcy filing prevented it from funding the Plans. JA 125-126. *See supra* note 13.

[17] As the district court found, "[t]he Record partially belies the PBGC's contention that an alleged improvement in LTV Steel's financial improvement was an important factor in the restoration. An early draft of an Executive Summary dated September 18, 1987, concerning the SEPPAA Working Group recommendation to restore the Plans states, 'During their deliberation on this matter, the members of the working group indicated that they would have recommended restoration in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed.' In the final draft of this Executive Summary,

In addition, the PBGC's Notice of Restoration was based on insufficient data. The PBGC's estimates of LTV Corp.'s and LTV Steel's operating income rested on actual operating income results for only the *first five months of 1987*. Considering the magnitude of the restored obligations, the court of appeals correctly concluded that "five months is too short a period of time to determine an income trend." *Id.* at 1019. However, the PBGC now has several years of operating results at LTV Steel on which to base projections, and the PBGC is in an ideal position to assemble an appropriate record relating to financial affordability if, in fact, it can be established. *See* Brief *Amicus Curiae* of Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation, and USX Corporation at 18-22.

The district court and the court of appeals properly vacated the Notice of Restoration and remanded the restoration issue to the PBGC for further consideration on a more developed factual record.

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which was forwarded to the Executive Director, this sentence was changed to read, 'LTV's improved financial circumstances were not the primary basis for the recommendation that the plans be restored.' " Pet. App. 110a-111a (citations omitted).

II. IN THE CONTEXT OF A BANKRUPTCY REORGANIZATION CASE, IT IS THE EXCLUSIVE RESPONSIBILITY OF THE APPROPRIATE COURT, NOT THE PBGC, TO HARMONIZE ERISA WITH OTHER FEDERAL STATUTES AND POLICIES BY INTEGRATING RESTORATION OF PREVIOUSLY TERMINATED PENSION PLANS, IF POSSIBLE, INTO A FEASIBLE PLAN OF REORGANIZATION PURSUANT TO STANDARDS PRESCRIBED BY CONGRESS IN ERISA §4041(c)(2)(B)(ii).

The court of appeals recognized that "[a]lthough this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." Pet. App. 16a. It also correctly held that restoration of a terminated pension plan, when the plan sponsor is a debtor in the process of reorganizing under Chapter 11 of the Bankruptcy Code, cannot be effectuated without considering the competing policies of federal laws other than ERISA.

Both the PBGC and the Solicitor General concede that ERISA §4041(c)(2)(B)(ii) embodies Congress' harmonization of ERISA and the Bankruptcy Code. PBGC Br. at 43; U.S. Br. at 21-22. Under §4041(c)(2)(B)(ii), the court must ultimately determine the status of the pension plan within the context of formulating a plan of reorganization. Although that statutory provision establishes the paramount importance of bankruptcy reorganization, it also represents Congress' judgment that pension plans shall not be terminated and shall continue, unless the bankruptcy court makes a finding that, without termination, a debtor will not be able to pay all its debts as restructured pursuant to a plan of reorganization and will be unable to continue in business outside the Chapter 11 reorganization process. Thus,

where the PBGC has determined to restore, if the court can identify a confirmable reorganization plan which incorporates restoration of the pension plans, it must confirm that plan over alternative plans which do not include the restored plans.

Congress, in ERISA §4041(c)(2)(B)(ii), specifically allocated the duty of performing any necessary harmonization of the goals of ERISA and of the bankruptcy law to the "*appropriate court*. . . ." Thus, Congress has specifically stated that the PBGC is not the appropriate entity to evaluate and reconcile these competing federal policies. The PBGC has neither the statutory authority, nor the expertise to take into consideration competing non-ERISA federal policies.

The PBGC, a government corporation created under ERISA to further the goals of ERISA, cannot be faulted for "focusing inordinately on ERISA." Pet. App. 17a.

A. The Goals And Policies Of ERISA Must Be Harmonized With The Bankruptcy Code Chapter 11 Goals And Policies Of Rehabilitation And Reorganization Of The Debtor.

The PBGC asserts that this case does not involve the potential conflict between federal statutes or policies and does not require harmonization. However, the PBGC's position that ERISA §4047 and the policies of ERISA require a court to accept the PBGC's restoration of millions of dollars of annual pension funding obligations on a debtor in the process of reorganizing, regardless of whether the court concludes that restoration will

promote the goal of reorganization, directly frustrates the bankruptcy policy in favor of reorganization and cannot be squared with any set of rational objectives.

Bankruptcy policy favors reorganization and equitable treatment of claims. As this Court explained in *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co.*, 294 U.S. 648, 676 (1935), a reorganization proceeding "is not an ordinary proceeding in bankruptcy." The Bankruptcy Code expresses congressional preference for reorganization over liquidation to permit a debtor to "continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News pp. 5787, 5963, 6179. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources"); *Matter of A & B Heating & Air Conditioning*, 823 F.2d 462, 465 (11th Cir. 1987) (Bankruptcy Code "expresses a preference toward reorganization rather than liquidation"). In this context, these important purposes cannot be ignored.

In *Bildisco*, the Court stated, in dealing with conflicting provisions and policies of the National Labor Relations Act and the Bankruptcy Code:

> [T]he Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, *but rather only how the equities relate to the success of the reorganization.*

Id. at 527.

The policy of ERISA, on the other hand, clearly favors continuation of pension plans. The statute, as amended, provides for the PBGC's assumption of pension obligations only in exceptional circumstances. In the 1986 amendments to ERISA, Congress declared that the policy of Title IV of ERISA was to encourage "the maintenance and growth of single-employer defined benefit pension plans" and to provide "for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system *only in cases of severe hardship*. . . ." SEPPAA §11002, 29 U.S.C. §1001b (Supp. IV 1986).

The Court has consistently held that when a competing federal statutory scheme is implicated in a bankruptcy proceeding, the goals and policies of the Bankruptcy Code must be harmonized with the goals and policies of other statutory schemes. *See Midlantic National Bank v. New Jersey Dept. Of Environmental Protection.*, 474 U.S. 494 (1986); *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

In *Midlantic*, this Court addressed whether section 554(a) of the Bankruptcy Code, 11 U.S.C. §554(a), "authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety." *Id.* at 496. This Court refused to read the bankruptcy statute to override all other concerns and held that nonbankruptcy considerations of health and safety

may not be ignored. The Court relied not only on the specific state health and safety statutes invoked by the litigants, but also on "repeated congressional emphasis on its 'goal of protecting the environment against toxic pollution.'" *Id.* at 505 (citing *Chemical Mfrs. Assoc., Inc. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 143 (1985)). It found these policies embodied in other federal statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act. 42 U.S.C. §9606 *et seq.* Likewise, although a court must recognize reorganization as the paramount goal, it must also effectuate the policies of ERISA to the extent possible.

In *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984), the debtor-in-possession asserted that the explicit terms of 11 U.S.C. §365(a) allowed it to reject a collective bargaining agreement and that the judicial standard for reviewing the rejection should be the same as for all other executory contracts. The Court acknowledged that "there is no indication in §365 of the Bankruptcy Code that rejection of collective-bargaining agreements should be governed by a standard different from that governing other executory contracts. . . ." *Id.* at 523. However, the Court adopted a higher standard, allowing rejection only "*if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.*" Id. at 526.[18] In formulating this standard,

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[18] In response to *Bildisco*, Congress in 1984 enacted 11 U.S.C. §1113, which provides a special mechanism and procedure when a Chapter 11 debtor seeks to modify its obligations under or reject a collective bargaining agreement. Terminating a pension plan when

the Court explicitly recognized the need to harmonize the "national labor policies of avoiding labor strife and encouraging collective bargaining" with "the policy of Chapter 11. . .to permit successful rehabilitation of debtors. . . ." *Id.* at 526-27. *See also In re Energy Resources Co., Inc.*, 871 F.2d 223 (1st Cir. 1989), *cert. granted*, 110 S. Ct. 402 (1989) (involving conflicting policies of Bankruptcy Code and Internal Revenue Code).

As a result of the interpretation of ERISA adopted by the PBGC, the restoration issue has brought ERISA and the Bankruptcy Code into conflict and harmonization is required here.

B. Pension Plan Restoration Determinations Made By The PBGC Must Be Evaluated Against And Balanced With The Paramount Goal Of Bankruptcy Reorganization.

Chapter 11 of the Bankruptcy Code affords a financially troubled business an opportunity to restructure its finances to enable it to continue its operations. To that goal, Chapter 11 enables a debtor to remain in control of its assets and business while negotiating a restructuring of its affairs. 11 U.S.C. §1107. The Bankruptcy Code provides an orderly process for a debtor to negotiate with its creditors and interest holders in a central forum along with a set of rules and procedures for administration of a Chapter 11 case. A fundamental objective of Chapter 11 is to promote and foster fully negotiated consensual plans of reorganization. *See, e.g., In re Texas Extrusion Corp.*, 68 Bankr. 712, 718 (N.D. Tex 1986); *In re American*

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to do so violates the terms of a collective bargaining agreement is subject to the procedure. Therefore, unilateral refusal to fund the pension plan should not be permitted. *See* 11 U.S.C. §1113(f).

Solar King Corp., 90 Bankr. 808, 825, n.33 (Bankr. W.D. Tex. 1988); *In re Pub. Serv. Co. of New Hampshire*, 88 Bankr. 521, 539-40 (Bankr. D. N.H. 1988); *In re UNR Indus., Inc.*, 72 Bankr. 789, 792-93 (Bankr. N.D. Ill. 1987); *In re Jartran, Inc.*, 44 Bankr. 331, 363 (Bankr. N.D. Ill. 1984).

Congress has incorporated within Chapter 11 of the Bankruptcy Code a number of mechanisms which afford restructuring opportunities to a debtor and to creditors and interest holders. These mechanisms have potential impact on each constituency, as well as on others who have contractual relationships with the debtor. The bankruptcy laws contemplate a balancing of the interests of debtors, creditors, employees, and the public. *See Pepper v. Litton*, 308 U.S. 295 (1939). Often, these mechanisms are brought into play during the course of a bankruptcy reorganization case to provide interim relief to the debtor in the process of reorganization, and to protect other parties whose private contractual rights are being affected.

When a plan sponsor is a debtor attempting to reorganize under Chapter 11, the status of its pension plan (*i.e.*, terminated or ongoing) must be carefully integrated into the fragile and complex process of formulating an effective plan of reorganization.[19] This method of harmonization

[19] The Bankruptcy Code contains explicit provisions dealing with the contents of a plan of reorganization, the process leading to implementation of those plans and the actual implementation. A plan of reorganization must classify claims and interest, specify any classes of claims or interests that are not impaired, specify the treatment of impaired classes, provide the same treatment for each claim or interest of a particular class, provide adequate means for the plan's implementation, provide for certain charter changes when the debtor is a corporation, and contain provisions pertaining

comports with Congress' explicit intent as expressed in ERISA §4041(c)(2)(B)(ii), and properly accommodates the competing goals of Chapter 11 of the Bankruptcy Code and Title IV of ERISA.

In §4041(c)(2)(B)(ii) of ERISA, Congress set forth the standard and established the priorities for harmonizing the conflicts that arise among competing federal policies concerning the status of pension plans in the context of a Chapter 11 reorganization. In this section, Congress clearly declared its strong preference that pension plans continue. Under ERISA §4041(c)(2)(B)(ii), a plan of reorganization must provide for the continuation of an ongoing pension plan after confirmation unless the debtor can establish that reorganization is impossible without a distress termination. The statute provides that the bankruptcy court may approve the termination *only* if it finds that "unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in

to the selection of officers, directors, trustees, and their successors. 11 U.S.C. §1123(a). The plan of reorganization may also include other provisions that are not inconsistent with applicable provisions of the Bankruptcy Code. 11 U.S.C. §1123(b).

A plan of reorganization must be accepted by requisite numbers of creditors (11 U.S.C. §1126) after a court approved disclosure of "adequate information" is transmitted to all creditors and interest holders. 11 U.S.C. §1125.

Then, if the plan of reorganization is accepted, the court, after notice, holds a hearing on confirmation of the plan (11 U.S.C. §1128), and the court confirms the plan if it meets the statutory requirements, including a requirement that the plan of reorganization be feasible and is not likely to be followed by liquidation. 11 U.S.C. §1129. Confirmation of the plan of reorganization binds all parties, and, unless the plan provides otherwise, confirmation of the plan of reorganization discharges the debtor from all debts and vests all property of the estate back in the debtor. 11 U.S.C. §1141.

business outside the Chapter 11 reorganization process. . . ." 29 U.S.C. §1341(c)(2)(B)(ii). In this section Congress "tried to balance the need to limit access to the insurance system to cases of genuine need against *the danger of making the tests so stringent that nothing short of total liquidation would qualify for PBGC assistance.*" H.R. Rep. No. 241, 99th Cong., 1st Sess., pt. 2, at 49 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 707.

The PBGC concedes that the test set forth in ERISA §4041(c)(2)(B)(ii) is Congress' own harmonization of ERISA and bankruptcy law. *See* PBGC Br. at 43. The Solicitor General likewise admits that in this section, "Congress has itself harmonized ERISA . . . and the Bankruptcy Code." U.S. Brief at 21. As the government explains, a debtor-initiated termination "may be permitted only when necessary for an employer to stay in business." *Id.* at 22. Although the PBGC pays lip service to the standards Congress prescribed for harmonizing ERISA and the Bankruptcy Code, it nevertheless asserts that restoration can be accomplished without consideration of bankruptcy policy, ignoring the very harmonization that it admits Congress intended. These positions cannot be reconciled.

Section 4041(c)(2)(B)(ii) illustrates Congress' intent that a pension plan normally "ride through" the reorganization. Pension plan termination should be the exception. In like manner, undoing the termination – in this case restoration – should be implemented when it will not defeat a reorganization. The paramount importance of reorganization is also illustrated in other ERISA

provisions. Section 514(d) of ERISA, 29 U.S.C. §1144(d), for instance, provides that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." Courts, including the courts below in this case, consistently find that this section evinces Congress' intent that the "Bankruptcy Code [be] effective over any ERISA provision to the contrary." *In re Goff,* 706 F.2d 574, 587 (5th Cir. 1983). *See In re Silldorff,* 96 Bankr. 859, 863 (Bankr. C.D. Ill. 1989); *In re Pulaski Highway Express, Inc.,* 41 Bankr. 305, 309-10 (Bankr. M.D. Tenn. 1984); *In re Baviello,* 12 Bankr. 412, 417 (Bankr. E.D. N.Y. 1981).[20]

The primacy of the bankruptcy policy in favor of reorganization is also reflected in both §§1123(a) and 1142(a) of the Bankruptcy Code, which govern the content and implementation of a reorganization plan. These sections begin with the preamble *"[n]otwithstanding any otherwise applicable nonbankruptcy law. . . ."* 11 U.S.C. §§1123(a) and 1142(a). Section 1123(a) provides that the reorganization plan shall, *inter alia,* designate classes of claims and specify if they are impaired and "provide adequate means for the plan's implementation." Section 1123(b), which is explicitly subject

[20] Although the PBGC suggests that §514(d) does not apply because it only applies to title I of ERISA and §4047 is in title IV, it is clear that the policies of ERISA upon which the PBGC relies to interpret §4047 are contained in title I of ERISA. *See* 29 U.S.C. §§1001, 1001b (Supp. IV 1986). Thus, both the district court and the court of appeals were plainly correct in rejecting the hypertechnical argument the PBGC now makes and in giving effect to Congress' manifest intention.

to subsection (a), also allows certain other provisions to be contained in a plan of reorganization including "any other appropriate provision not inconsistent with the applicable provisions of [title 11]."

Similarly, §1142(a) of the Bankruptcy Code provides that "[n]otwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court." 11 U.S.C. §1142(a).

To allow the PBGC itself to implement restoration of the Plans, without some consideration being given to the effect restoration will have on the prospects for a successful reorganization, would contravene other well-established bankruptcy principles, as well. It would be, in effect, to allow the PBGC to dictate the terms of the reorganization. The lower courts have consistently rejected as impermissible such efforts by interested parties in a bankruptcy. *See In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983); *In re DRW Property Co.*, 54 Bankr. 489, 497 (Bankr. N.D. Texas 1985); *In re Beker Indus. Corp.*, 64 Bankr. 900, 906 (Bankr. S.D.N.Y. 1986), *rev'd on other grounds*, 89 Bankr. 336 (S.D.N.Y. 1988); *In re Fremont Battery Co.*, 73 Bankr. 277, 279 (Bankr. N.D. Ohio 1987). The courts have refused to permit parties to take action that would severely hamper the ability of the debtor to reorganize or would have dictated the contents of a plan of reorganization. Actions which have the effect of constraining the terms of a future plan of reorganization are not permitted without giving

to creditors the protections of the plan procedures – procedures which involve, at the very least, disclosure and voting rights.

Although the strong policies favoring continuation of pension plans must be accommodated in the reorganization process, the court must stop short of restoring a plan when to do so will prevent reorganization, force a liquidation and thus frustrate the goals of all the relevant statutes. The court must therefore implement restoration only when the integrity of the reorganization process and the ultimate success of a plan of reorganization will not be jeopardized.

Regardless of the conclusions the Court may reach on the other issues, it is respectfully submitted that it would be appropriate in this complex matter for the Court in its disposition to provide guidance with respect to subsequent proceedings and to direct further consideration of the question whether restoration of the three Plans, if otherwise appropriate, would make the Debtors' successful reorganization impossible.

C. The PBGC Has Neither The Statutory Authority Nor The Expertise To Conduct The Detailed Analysis Of Competing Interests Necessary To Harmonize ERISA With The Federal Bankruptcy Laws And To Apply The Federal Pension Laws In The Bankruptcy Reorganization Context.

The court of appeals suggested that the PBGC was the appropriate entity to harmonize ERISA policies and other federal law policies in determining whether to restore a terminated pension plan to a plan sponsor attempting to reorganize in Chapter 11. Pet. App. 17a. However, according to the explicit terms of ERISA §4041(c)(2)(B)(ii), only the "*appropriate court*" is authorized to perform

such harmonization. The "*court*" determines whether termination of the plan is required to allow the debtors to pay their debts pursuant to a plan of reorganization and continue in business outside the Chapter 11 reorganization process. *Id.* The PBGC is clearly *not* authorized to harmonize competing federal statutes.[21] As the PBGC itself correctly argues (PBGC Br. at 40), the explicit, unambiguous terms of ERISA §4047 *limit* the PBGC's authority to a determination that restoration is "appropriate and consistent with [the PBGC's] duties under [ERISA]." Thus, Congress has given the PBGC no authority to consider the policies to be fostered by statutes other than ERISA.

Beyond its lack of statutory authority, the PBGC also lacks the expertise required to evaluate the non-ERISA reorganization concerns that are present when restoration must be evaluated in the context of a Chapter 11 case. Unlike the district court or a bankruptcy judge, the PBGC has no experience that would qualify it to evaluate the competing claims advanced by the Debtors, by creditor constituencies, by equity holders and by employees. The PBGC's range of concerns is narrowly circumscribed by §4002(a) of ERISA and is strictly limited to pension concerns.[22] Congress

[21] The procedure advocated by the Parent Creditors' Committee would apply in those instances where restoration of the Plans cannot be accomplished by agreement.

[22] Even if the PBGC were to attempt to integrate non-ERISA concerns into a restoration determination, its conclusions on these issues would be entitled to no deference, and the reviewing court would be required to apply a *de novo* standard of review. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) ("While the [NLRB]'s interpretation of the NLRA should be given some deference, the

never intended to delegate authority to the PBGC to harmonize conflicting federal statutes or policies.[23]

The district courts, subject to full appellate review of their conclusions, are the appropriate courts to balance the policies of competing federal statutes, as Congress recognized when it enacted ERISA §4041, 29 U.S.C. §1341.[24]

D. Implementation Of A PBGC Restoration Determination Requires Court Approval And A Court Order.

Requiring court approval for restoration under the foregoing analysis also eliminates the inconsistency inherent in allowing the PBGC unilaterally to restore a pension plan where an existing court order declares the plans to be terminated.

ERISA confers *"exclusive"* jurisdiction over a plan and its property on the federal court in which the PBGC brings its suit for termination. ERISA §4042(f), 29 U.S.C. §1342(f). As applied here, §4042(f) conferred exclusive jurisdiction over the Plans

proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress' intent in passing the Bankruptcy Code").

[23] The PBGC's financial interest in the restoration decision creates a potential source of bias that raises a serious question whether the PBGC possesses the impartiality that is necessary in a body entrusted with the responsibility for the delicate task of harmonizing the competing statutory policies implicated by restoration. The PBGC can hardly be expected to afford the competing interests of other creditors, who may have no interest in seeing pensions preserved, the same degree of concern as its own pension-focused and statutorily mandated interests. This is particularly true in this case where a restoration, followed by retermination, might increase the PBGC's bankruptcy claims by $800 million.

[24] The district courts have broad powers to refer to the bankruptcy courts issues appropriately to be addressed by the bankruptcy courts in the first instance. *See* 28 U.S.C. §157(a).

and their property on the district court when PBGC brought the three earlier suits on claims of termination. The consent decrees terminating the Plans thus constituted binding adjudications of the status of the Plans by the court with exclusive jurisdiction.

The fact that the decrees of termination were consent decrees makes them no less binding upon the PBGC. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). A consent judgment, like any other judgment, has continuing effect, although a party may always request a modification if there is a change in circumstances. *Mayberry v. Maroney*, 529 F.2d 332, 335 (3d Cir. 1976); *Rhem v. Malcolm*, 432 F. Supp. 769, 780 (S.D.N.Y. 1977); *see also* Fed. R. Civ. P. 60(b)(5).

The earlier decrees of termination entered by the district court remained in full force and effect, and a restoration of the Plans could not properly occur until those decrees were vacated.[25] The

[25] The legislative history of SEPPAA indicates that Congress never intended the PBGC to have unfettered discretion to restore a terminated plan without court approval. As the district court noted in a footnote, the language of the SEPPAA amendments to ERISA suggest "*that Congress recognized that the decision on restoration should rest with the appropriate adjudicative entity, government agency or court in cases of challenges by third parties to the propriety of a proposed voluntary plan of termination, and that the PBGC is not the appropriate decision-maker.*" The court referred to the House Committee Report:

> The Committee recognizes that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual or statutory rights of any affected parties. Rather this determination must ultimately rest with the appropriate adjudicative entity, government agency, or court, as the case may be. Furthermore, the decision on what the appropriate remedy should be if the termination is found to have been improper (and specifically, *whether or not the plan should be*

PBGC's restoration determination, if self-executing, would be nothing less than an administrative reversal of a district court order. The PBGC cannot unilaterally undermine the order of a court of competent jurisdiction. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950) (the FTC "cannot intrude upon or usurp the court's function of adjudication"); *United States v. Waters*, 133 U.S. 208 (1890) (attorney general cannot alter district attorney's fees which were determined by district court acting in its judicial capacity, nor is determination subject to revision or reversal by the attorney general); *United States v. O'Grady*, 89 U.S. (22 Wall) 641 (1875).

The PBGC was required to apply to the district court to substitute for its termination order an order restoring the Plans. Such an order is governed by the standards set forth in §4041(c)(2)(B)(ii).

E. The District Courts Possess The Flexible Power, In Appropriate Cases, To Make An Interim Decision To Give Effect To Restoration Of A Pension Plan Prior To Confirmation Of A Plan Of Reorganization.

If the PBGC determines, based exclusively on ERISA considerations, that restoration is appropriate, and applies, as it is required to do, to the

> *restored*) also rests with the appropriate adjudicative entity, government agency or court.

H.R.Rep. No. 300, 99th Cong., 2d Sess. 293, *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 944 (emphasis added); *In re Chateaugay Corp.*, 87 Bankr. 779, 809 n.25 (S.D.N.Y. 1988). *See also Coit Indep. Joint Venture v. Federal Savings & Loan Ins. Corp.*, 109 S. Ct. 1361, 1369 (1989) (finding that Congress did not grant FSLIC adjudicative authority over creditors' claims against insolvent savings and loan association); *FDIC v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989).

district court that had entered the order approving termination, the district court may determine that a plan of reorganization providing for continuation of the Plans after confirmation is possible. If the district court so determines, the termination order should be vacated, and the court is required to give effect to the PBGC's restoration determination.

If the court can make an interim decision that restoration will not prevent the debtor from continuing to operate, will not prevent an equitable distribution to creditors, and will not substantially impede a successful reorganization, it may be appropriate for the court to order restoration even prior to the confirmation of a reorganization plan.

If the court were unable to conclude that reorganization with restoration is possible, the plan at issue would not be restored at that time. However, the statutory scheme still allows adequate flexibility. If it is premature for the court to determine at that stage whether restoration would make reorganization impossible, the court has the power to defer the decision to restore or terminate until such time as it can make that determination. The court also possesses the power to order interim measures to ensure that rights of interested parties are not prejudiced. It may order interim funding of the plan benefits on a pay-as-you-go basis until the issues are ripe for final decision.[26] Therefore, any decision to postpone the determination as premature and the attendant delay need not seriously jeopardize the rights of any parties. And,

[26] The provisions of the Bankruptcy Code also grant the court sufficient flexibility to integrate restoration into the process, either in the long run plan, *or*, on an immediate basis.

to avoid unnecessary delay, the court has ample power to accelerate the case (*e.g.*, by terminating or shortening the period of exclusivity). *See, e.g.*, 11 U.S.C. §1121; *In re Public Service Co. of New Hampshire*, 99 Bankr. 155 (Bankr. D. N.H. 1989) (refusing to extend exclusivity period); *see also In re Timbers of Inwood Forest Assoc., Ltd.*, 808 F.2d 363, 373 (5th Cir. 1987), *aff'd*, 484 U.S. 365, 375-76 (1988).

III. CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals affirming the district court's vacation of the Notice of Restoration and remanding to the PBGC should be affirmed. However, on remand the PBGC should make its restoration determination based only on ERISA-related factors. If, after remand and on an adequate administrative record, the PBGC again determines that restoration is warranted, the effect of restoration on the Debtors' ability to reorganize must be considered, in a second step, by the appropriate court before any restoration determination can be implemented.

Respectfully submitted,

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Dated: January 16, 1990

No. 89-390

(23)

IN THE

Supreme Court of the United States

October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; and WILLIAM W. SHAFFER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS

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QUESTIONS PRESENTED

Respondent Official Committee of Equity Security Holders ("Equity Committee") adopts the Questions Presented as rephrased in the brief of the Respondents The LTV Corporation, *et al.*

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BRIEF OF RESPONDENT, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves The Fifth Amendment to the United States Constitution, the statutes referred to in the briefs of the Petitioner and the Respondents, The LTV Corporation, *et al.*, and the Administrative Procedure Act, 5 U.S.C. §§ 554(c), 556(a) and (e), 557(a) and (c) and 706(2)(A), (D) and (E). See Appendix A to this brief.

STATEMENT OF THE CASE

This case concerns the ongoing effort of The LTV Corporation, its creditors and equity holders to restructure LTV's obligations—including its pension obligations—in a Chapter 11 case under the United States Bankruptcy Code.

On or about July 17, 1986 (the "Petition Date"), LTV and sixty-six related affiliates, including LTV Steel Company, Inc. (collectively, the "Debtors" or "LTV"), filed petitions for reorganization under Chapter 11 of Title 11, United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). The cases have been consolidated procedurally and are being jointly administered pursuant to an order of the Bankruptcy Court.

The principal reason given by the Debtors for filing the Chapter 11 petitions was the need to resolve their multi-billion dollar pension liability problem. As of the Petition Date, LTV Steel was the plan sponsor of four single employer defined benefit pension plans (the "Plans"), as defined by ERISA. LTV was the plan administrator of the Plans, as defined by ERISA, 29 U.S.C. § 1002.

Almost immediately after LTV filed its Chapter 11 petitions, the Pension Benefit Guaranty Corporation ("PBGC") became an active player in the drama. LTV Steel took the position that its bankruptcy filing prevented it from making pension plan payments except by order of the Bankruptcy Court because such contributions would otherwise constitute an improper payment of pre-petition debts. As a result, on August 28, 1986 LTV Steel applied to the Internal Revenue Service ("IRS") for a waiver of its minimum annual pension funding obligations in the amount of $215 million for the four LTV Steel Plans for the plan year ending December 31, 1985. On September 30, 1986 the District Court entered an order, with the consent of LTV, terminating one of the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. The terminated Plan is not at issue in this case.

In November, 1986 the IRS, after consultation with PBGC, denied LTV Steel's funding waiver requests for the three remaining Plans for the plan year 1985 in the amount of $205 million, and additionally revoked the previously granted waiver for plan year 1984 in the amount of $175 million.

On December 15, 1986, PBGC staff personnel in the form of a "SEPPAA Trusteeship Working Group" met to determine whether to terminate the three remaining Plans involuntarily because of (1) the denial (in which PBGC had played a role) of funding waivers by the IRS which left the Plans in violation of the minimum funding standards; and (2) the views of Mr. Mike Wells, Associate Director, Insurance Operations Department and senior financial person for PBGC, that "the probability that LTV can survive with the Plans intact is 'de minimis.'" JA 121-24.[1]

PBGC's Working Group met twice more on December 18, 1986 and January 5, 1987, and recommended involuntary termination of the three Plans to the agency's Executive Director, after the Group concluded that "LTV could not afford to maintain the Plans," and that a projected and optimistic $300 million cash flow per year and a "cash build-up of just over $1 billion by the end of 1988 would not be sufficient to finance a plan of reorganization and the ongoing Plans." The group's conclusion was that the termination must occur "now or later." JA 128-31, 137-40.

On January 12, 1987, upon application by PBGC and consent of LTV, the District Court entered orders terminating the Plans pursuant to the involuntary termination provisions of ERISA, 29 U.S.C. § 1342. JA 141-42; See also AR 1533-41. As a result of the terminations of the Plans, PBGC became the statutory guarantor and trustee of each Plan, and was vested with complete authority and control

[1] As utilized in Petitioner's Brief, references to the Joint Appendix are designated herein as "JA," and to the Administrative Record as "AR". References to the Appendix to the Certiorari Petition are designated herein as "Pet. Appx." with the letter "a" following the indicated pages, and to the Equity Committee's Appendix to its Certiorari opposition as "Resp. Eq. Appx." with the letter "a" following the indicated pages.

over the administration of each Plan. PBGC also became liable for funding the payment of a portion of the non-forfeitable benefits due beneficiaries under the Plans.

The United Steelworkers of America ("USWA" or "Union"), the collective bargaining representative for hourly-paid employees of LTV Steel, strenuously objected to termination of the two plans for hourly employees and to the resulting reduction in benefits paid to its members. The Union unsuccessfully appealed the termination orders and also filed suit in the Bankruptcy Court on January 16, 1987, seeking to obtain payment of benefits under the Plans on the grounds that the reduction in pension benefits constituted a breach of the existing collective bargaining agreement between the Union and LTV Steel and section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113. The Union also threatened a strike if its demands remained unsatisfied. Fearing that a strike would paralyze the Debtors early in their reorganization effort, and prepared to alleviate some of the hardships imposed on active and retired employees, LTV Steel took the steps needed to address the Union demands, including the negotiation of an interim collective bargaining agreement. LTV Steel obtained Bankruptcy Court approval to make a single hardship payment to retirees affected by the Plan terminations. Additionally, LTV Steel and the Union entered into a modified collective bargaining agreement to remain in effect only until the earlier of confirmation of a plan of reorganization for LTV Steel or April, 1990 (the "Interim Agreement"). JA 275-310, at 282. The Interim Agreement resolved the Union's lawsuit by granting its members some additional pension benefits. Over the objection of PBGC, a voluntary and active participant in the bankruptcy proceedings, the Interim Agreement was approved by the Bankruptcy Court on July 30, 1987. AR 1554-56. The Bankruptcy Court, the District Court and the Court of Appeals denied PBGC's applications to stay the implementation of the Interim Agreement.

Immediately thereafter, PBGC asserted that the benefit plans provided by the Interim Agreement were nothing more than abusive "follow-on plans" that allowed LTV Steel to offer as high a level of benefits to present and former employees as had been provided by the terminated Plans while shifting a substantial portion of the costs to PBGC. JA 312-18. On August 12, 1987, the SEPPAA Trusteeship Working Group, without a formal hearing, issued a recommendation that the three LTV Steel Plans be restored to prevent the so-called abuse of the pension insurance program. This recommendation was based upon the Working Group's conclusions that: (1) LTV Steel had established abusive follow-up plans which provided substantially the same benefits to present and former employees as the terminated Plans and were partially funded by PBGC; (2) the improvement in LTV Steel's financial position in the six months since termination of the three Plans at issue justified restoration; and (3) LTV Steel had demonstrated a willingness to fund its employee retirement Plans. JA 319-20.

These conclusions contain obvious substantive and procedural problems for PBGC. First, the finding of improvement in LTV Steel's financial position was a dramatic turnaround from PBGC's conclusion, when the Plans were terminated just over six months earlier, that LTV lacked the long-term capacity to fund them. Second, PBGC never acknowledged any responsibility to work within the bankruptcy framework to assist plan beneficiaries while a court-supervised reorganization was in progress and never explained how the Interim Agreement was "abusive" or how PBGC's long-run financial concerns had been dispelled by LTV's sudden, short-term improvement. Before making a decision, the Executive Director consulted with the Board of Directors of PBGC which upheld the authority of the Executive Director to determine when particular plans should be restored. Pet. Appx. 180a-81a; JA 363.

On September 22, 1987, PBGC issued a notice of restoration, pursuant to ERISA section 4047, directing the restoration of three of the terminated LTV Steel Plans to their

pretermination status. Appx. 182a-83a. PBGC commenced this lawsuit to enforce its notice of restoration on October 9, 1987, in the United States District Court for the Southern District of New York. LTV then brought an action in the Bankruptcy Court alleging that restoration violated the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a). The District Court granted PBGC's motion to withdraw LTV's action from the Bankruptcy Court and considered both actions together.

The District Court denied PBGC's motion for summary judgment on June 22, 1988, and by judgment dated September 7, 1988 vacated PBGC's notice of restoration and remanded to PBGC for further proceedings. While the District Court upheld the power of PBGC to restore previously terminated plans, that court ruled that the agency had acted arbitrarily and capriciously in failing to observe the standards of the Administrative Procedure Act ("APA"). The court, in effect, drew a roadmap for the agency outlining the steps in plan restoration.

Instead of accepting the remand, PBGC appealed. On May 12, 1989 the United States Court of Appeals for the Second Circuit found, *inter alia*, that PBGC exceeded the bounds set by statutory procedures and permissible discretion because (1) PBGC could not restore the LTV Steel Plans solely by claiming that the Interim Agreement with USWA set up abusive follow-on plans; and (2) PBGC could not ignore the minimal procedures mandated by the APA in making the factual findings of improved economic circumstances and in failing to consider the impact of central policies of federal bankruptcy and labor laws applicable to this bankruptcy reorganization in reaching its decision. The appellate court also drew a roadmap outlining the steps in plan restoration for the agency. Not satisfied with the District Court and Court of Appeals decisions, PBGC still refuses to accept the remand and presses this appeal.

SUMMARY OF ARGUMENT

Although Section 4047 (29 U.S.C. § 1347) of the Employee Retirement Income Security Act of 1974 ("ERISA") permits PBGC to restore terminated benefit plans, Congress set no substantive standards for such restoration, or for the procedure to be utilized by the agency other than as articulated in the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

In considering restoration, PBGC should have provided a "reasoned analysis" for its actions, and should have followed APA procedures. In so doing, it should have considered the cross-currents involved in the impact of its actions on the bankruptcy law and—LTV employing many thousands of persons—on the labor law. However, PBGC failed to do so, and the administrative record allegedly supporting the restoration order reveals such woeful inadequacies as to be "arbitrary and capricious," as unanimously found by both federal courts below.[2]

[2] There is at least some question as to whether the Court of Appeals for the Second Circuit had appellate jurisdiction, and so whether this Court's review should lie. The Court of Appeals noted that all of the instant Respondent Equity Committee's claims were not disposed of by the District Court. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 875 F.2d 1008, 1013-15, 1021 (2d Cir. 1989). And Fed. R.Civ.P. Rule 54(b) provides for the entry of an appealable "final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. . . ." Such a determination was here made by the District Court. Pet. Appx. 132a. But a statement by a District Court that "there is no just reason for delay" should not routinely issue, generating piecemeal appeals. *Panichella v. Pennsylvania R. Co.*, 252 F.2d 452, 454-55 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960). Considering the propriety of permitting an appeal, the appellate court must "scrutinize the district court's evaluation of such factors as the inter-relationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units." See *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980). In exercising its appellate jurisdiction here, the Court of Appeals suggested that "strict technical compliance" with Rule 54(b) might, possibly, have barred its exercise of jurisdiction:

> In the instant case, it is more judicially efficient for us to exercise jurisdiction and reach the merits of the dispute now rather than cause a delay by demanding strict technical compliance with the certification requirement.

875 F.2d at 1015.

Insofar as PBGC's action was premised upon purported improvements in LTV's financial condition, the record only reflects PBGC's evaluation of that financial condition for a period of five months prior to the restoration order. No projection of LTV's long-term financial condition is reflected any place in the record, and so—for all that the record reveals—there would be considerable peril of retermination of the three Plans at issue.

Moreover, PBGC expresses concern that its own action of terminating the Plans burdens it with a liability of more than two billion dollars threatening its own financial soundness, and posing inequitable burdens on those who, pursuant to law, are compelled to fund PBGC. This two billion dollar projection, however, is demonstrably unsound.

Were the PBGC restoration directive to be effective, PBGC's failure to have considered the pending proceedings in the Bankruptcy Court, and the impact of PBGC's actions on LTV's creditors and equity holders and its labor force, would endanger the Chapter 11 reorganization, and hence LTV's ability to continue operations and its employment of tens of thousands of working people.

PBGC's conclusion that the Plans were to be restored because LTV had created so-called abusive "follow-on plans" is not only without statutory authority, and at odds with ERISA's Congressional history, but is unsupported by any side-by-side comparison of the Plans and the mislabeled "follow-on plans."

Indeed, PBGC's restoration decision is arbitrary and capricious, having taken place without formal hearings and any opportunity of LTV to present evidence and to cross-examine witnesses. PBGC's restoration decision, indeed, was made at the very moment that the Office of PBGC's Executive Director was in negotiations with LTV representatives on possible modes of resolving the LTV/PBGC differences and had falsely given LTV assurances of advance notice if PBGC action was to be taken.

Overall, PBGC's action so failed to accord LTV reasonable administrative safeguards as to deprive it of minimal due process protections, and—were the PBGC's administrative mandate to be enforced—to threaten the assets being administered in the Chapter 11 cases and to seriously endanger LTV's ability to reorganize.

ARGUMENT

I. THE PBGC ACTION, PROPERLY BRANDED BELOW AS "ARBITRARY AND CAPRICIOUS," CANNOT SURVIVE STATUTORY AND CONSTITUTIONAL SCRUTINY.

A. PBGC'S Restoration Authority, When Properly Exercised, Is Beyond Dispute.

Section 4047 of ERISA expresses Congress' clear statutory grant of authority to PBGC to restore terminated pension plans. In pertinent part the section reads:

> In the case of a plan which has been terminated under section 1342 of this title, the corporation [PBGC] is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pre-termination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

29 U.S.C. § 1347 ("4047").

In its Brief PBGC notes that Congress enacted extensive amendments to ERISA in the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), that one of the SEPPAA provisions amended Section 4047 and, with that as a jumping off point, states that "[t]he legislative history therefore confirms what the plain language of the statute says—that Congress granted PBGC the discretion to decide when to restore pension plans, and that it intended

the agency to do so whenever the PBGC determines that restoration is 'appropriate and consistent' with its statutory duties." (Pet. Brief, p. 23.)

If anything is clear in the SEPPAA Amendments to Title IV, it is that Congress intended to limit voluntary terminations of single employer pension plans and to enhance PBGC's ability to force a quick and final judicial decree of involuntary termination. SEPPAA expanded the period involved in the filing of a notice of intent to terminate from ten to sixty days (29 U.S.C. § 1341(a)(2)), precluded PBGC from processing a termination when an existing collective bargaining agreement was in force (28 U.S.C. § 1341(a)(3)), and severely limited an employer's ability to voluntarily terminate an underfunded plan for purely financial reasons to those situations where an employer was bankrupt, or in a reorganization case after the Bankruptcy Court approved the termination because the employer would be unable to stay in business and pay its debts when due (29 U.S.C. § 1341(c)).

Congress permitted PBGC to use a "simplified procedure" for involuntary terminations of small plans (29 U.S.C. § 1342(a)), and made it clear that PBGC could involuntarily terminate a plan despite the pendency of a bankruptcy or reorganization case (29 U.S.C. § 1342(c)). Although the 1986 amendments made conforming changes to section 4047, Congress did not deal with or even discuss PBGC's ability to restore a previously terminated plan.

Yet, and with virtually no record to support its restoration decision, in September 1987 PBGC directed the restoration of the earlier terminated Plans, thereby seeking to relieve PBGC of the fiscal obligations it had assumed on their termination, and returning to the LTV entities, their creditors and equity holders, in Chapter 11, the funding obligations associated with the Plans which had precipitated, in part, the bankruptcy filing.

Recognizing that deference must ordinarily be given to an agency's interpretation, the judicial branch and not the executive branch of government is the "final authority on

issues of statutory construction." *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 n.9 (1984); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133 (D.C. Cir. 1984). As the D.C. Circuit so aptly noted:

> [I]n ascertaining the congressional intent underlying a specific provision, we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history.

Rettig, 744 F.2d at 141.

B. As the Courts Below Ruled, the PBGC's Authority to Restore Was Not Properly Exercised.

PBGC cannot dispute that, as an administrative agency, it is subject to the provisions of the Administrative Procedure Act, and that it is not free to act on its own misplaced pronouncements of policy, not in accordance with its Congressional mandate. *See, e.g., Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 844 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984); *A-T-0, Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1019 n.10 (6th Cir. 1980).

The Administrative Procedure Act requires the reviewing court to "set aside agency action...found to be...arbitrary, capricious, an abuse of discretion." 5 U.S.C. § 706(2)(A). An agency's action must also be set aside when not in accordance with procedures required by law (5 U.S.C. § 706(2)(D)), or when not supported by substantial evidence (5 U.S.C. § 706(2)(E)). And applicable provisions specify the right to a hearing, with proposed findings and conclusions (5 U.S.C. §§ 554(c), 556(a) and (e), and 557(a) and (c)), none of which were here afforded. This Court, in directing the amendment of an order of the Interstate Commerce Commission in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962), referred

to the Administrative Procedure Act when noting:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. [Authorities omitted] Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.

The Equity Committee position, that PBGC's action is without necessary support in the record, was—after quite complete and lengthy analysis—accepted by both courts below. Each court ruled that the agency could not restore the Plans without following procedures mandated by the APA, which it had not done, and without giving due regard—which, on the record, it had not given—to the applicable provisions of federal bankruptcy and labor law as well as ERISA.

PBGC, having terminated the Plans in January 1987, acted to restore them in September of that year. This Court, in *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), considering the question of judicial review of agencies' rulings, noted "[a]n agency interpretation…which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view". And in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983), this Court declared that "an agency changing its course…is obligated to supply a reasoned analysis for that change beyond that which may be required when an agency does not act in the first instance."

PBGC, however, supplied no "reasoned analysis." Indeed, here the appellate court below, in rejecting the

PBGC's summary judgment motion, noted:

> In the instant case, PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a plan sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying those standards. Failure to do any of these things renders the decision arbitrary and capricious.
>
> * * *
>
> On remand, PBGC may be able to justify its decision. However, based on the administrative record presented to the District Court and to us, its decision cannot be upheld. Because PBGC's decision was not sustainable on the administrative record, the District Court provided the appropriate remedy by vacating PBGC's Restoration Notice and remanding the matter to PBGC. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. at 143.

875 F.2d at 1021.

In reviewing the "arbitrary and capricious" finding by the courts below, this Court will weigh whether PBGC's decision was based upon "consideration of the relevant factors and whether there has been a clear error of judgment." *See, Marsh v. Oregon Natural Resources Council*, ___ U.S. ___, ___, 109 S. Ct. 1851, 1861 (1989); *see also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) ("The agency must articulate a 'rational connection between the facts found and the choice made'"); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Here, despite the soundness of judicial review of agency decisions (*see* Point I D, *infra* at p. 24), the essence of PBGC's position is that it—PBGC—is the law; involuntary restoration of the Plans is appropriate principally because PBGC wills it, and Congress having given it the power to restore pension plans, PBGC's judgment as to the manner of the exercise of those powers is not to be questioned.

C. In a Number of Critical Areas, the PBGC's Action Was Taken Without Adequate—or Any—Foundation.

An agency has acted arbitrarily when, choosing or implementing a particular course of action, it has:

> (1) relied on factors that Congress did not want it to consider; (2) failed to consider an important aspect of the problem; (3) given an explanation for its decision that is contrary to the evidence before it; or (4) given an explanation so implausible that it cannot be ascribed to any view of the facts or to the agency expertise.

New York Council, Association of Civilian Technicians v. Federal Labor Relations Authority, 757 F.2d 502, 508 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985). Yet these are the sorts of failings that were here indulged in—as noted by the courts below—by PBGC in arriving at its restoration directive.

1. *PBGC's claim of improvement in LTV's financial condition.* In taking its September 1987 action directing the Plans' restoration, the PBGC found, and in part relied upon, purported adequate LTV financial improvement—since January of that year—to justify restoration. In this regard the appellate court below noted:

> While improvement in financial circumstances is a basis for restoration the administrative record does not support PBGC's finding that LTV's financial circumstances had improved substantially enough to justify restoration.
>
> Interestingly, ERISA contains no standard by which to determine whether an employer can afford to resume liability for terminated pension plan programs. PBGC was thus left to its own discretion in assessing the financial well being of LTV. We believe that its assessment was erroneous.

875 F.2d at 1018.

The Equity Committee concedes that, when appropriate due to experience gains or increased funding, the PBGC has authority to end ongoing termination proceedings and to restore a plan to its former status. H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58. Yet here no long-term funding capacity is reflected in the record, nor does PBGC claim such long-term funding capacity has been found to exist. And PBGC's actions here in examining LTV's income trend for a mere handful of months also is inconsistent with earlier PBGC opinion letters addressing proposals for plan restoration. PBGC had previously consistently required plan sponsors to demonstrate the long-term capacity to fund plans and to avoid any prospective necessity for retermination. *See, e.g.*, PBGC Opinion Letter 83-5 (February 2, 1983) (Resp. Eq. Appx. 5a-6a) ("The Company agrees that it will not... terminate the Plan for at least five years after the date of the restoration of the Plan"); PBGC Opinion Letter 82-11 (April 1, 1982) (Resp. Eq. Appx. 1a-4a); PBGC Opinion Letter 77-132 (February 18, 1977) (Resp. Eq. Appx. 7a).

In this case, the administrative record is devoid of any consideration of the possibility of retermination. This is clearly inconsistent with the role of PBGC and the goals of ERISA. Restoration, without a reasoned determination of how LTV Steel would be able, going forward, to fund the Plans in a way highly unlikely to lead to retermination,

threatens the interests of the LTV entities, their creditors, their equity holders, plan participants, all PBGC premium payers and of PBGC itself.

In rejecting PBGC's finding that LTV's changed financial circumstances justified restoration of the Plans, the Court of Appeals identified several significant deficiencies in PBGC's administrative record including: (1) a summary financial analysis that reviewed LTV's income trend only for a five month period; (2) PBGC's assumption that LTV would be able to obtain funding waivers from the Internal Revenue Service for the years 1984 through 1986 and after, despite the fact that the IRS had denied LTV's request for a waiver for 1985 and had revoked a waiver for 1984; (3) PBGC's assumption that pension savings based upon job reductions in the Interim Agreement would be preserved in future labor agreements when the Union would be less likely to grant such concessions; and (4) PBGC's complete failure to assess the impact of LTV's status as a Chapter 11 debtor on its financial condition. 875 F.2d at 1018-20. The Court of Appeals criticized PBGC for focusing on LTV's short-term economic conditions, without considering the long-term implications of plan restoration, including the likelihood of retermination. 875 F.2d at 1020.

2. *PBGC's claim of its assumption of a "two billion dollar" liability.* PBGC and the Solicitor General urge that barring restoration of the Plans, the PBGC will be assuming in excess of two billion dollars of LTV liabilities (Petitioner's brief, pp. 4, 8-9; Solicitor General's brief, pp. 7, 16 at n.10), and that this endangers PBGC and massively saddles gigantic expense upon those entities compelled to support it.

But this two billion dollar figure is far, far in excess of the real cost to the PBGC resulting from its being temporarily required to fund a portion of the Plans' liabilities. In fact, the two billion dollar figure is not the present cost of projected PBGC outlays during the Chapter 11 and pending remand. The assets of the Plans are sufficient to fund current payments to beneficiaries at ERISA minimum guaranteed levels, so that PBGC has not been required to make any payments from the insurance fund. The two billion dollar figure is the present value—apparently, as calculated by PBGC—of its projected payment stream for the remainder of the lives of participants in the three Plans, over many decades, after plans of reorganization presumably would long since have been confirmed by the Bankruptcy Court.

Even as such it is defective. The PBGC calculation uses an annuity interest rate, in the seven percent range; if a realistic market rate had been used—several percentage points higher to reflect PBGC's actual rate of return on assets—the projected underfunding would have been seen as dramatically less.

3. *PBGC's failure to adequately consider the Bankruptcy Court proceedings.* The Court of Appeals rejected PBGC's claim that the agency need not have considered the policies of federal labor law and of federal bankruptcy law implicated by its actions. 875 F.2d at 1015-16. Given that the legislative history of ERISA section 4047 demonstrates conclusively that changes in financial circumstances were the central factor for determining when restoration should be ordered (see discussion, *infra*, at p. 21), and given PBGC's ongoing voluntary participation in the bankruptcy proceedings, it is difficult to see how consideration of LTV's bankruptcy filing and the policy concerns of bankruptcy law could have been ignored by the agency.

Administrative agencies must always consider the impact of their decisions on other national policies and concerns, and competing concerns must be accommodated. *Burlington Truck*, 371 U.S. at 172-73. In *Burlington Truck* the Supreme Court directed a lower court to remand proceedings to the Interstate Commerce Commission because of the Commission's failure to have fully considered the impact of its decision on national labor policy and the requirement of federal labor laws.

The consideration of competing policies and statutes is particularly important here because of the critical status

of the reorganization proceedings, and the impact of those proceedings on tens of thousands of participants in the Plans, and upon hundreds of thousands of creditors and equity security holders. PBGC itself had participated in the Bankruptcy Court proceedings, vigorously objecting there to that court's approval of the LTV/United Steelworkers 1987 collective bargaining agreement which had adopted the interim pension plans. Having been unsuccessful there, PBGC's Notice of Restoration ignored—and, in effect, sought to undo—the collective bargaining agreement and the Interim Plans that had received Bankruptcy Court approval.

To make a reorganization most viable, the Bankruptcy Code—upon the commencement of reorganization proceedings—precludes a debtor from paying pre-petition debts, without Bankruptcy Court approval, which approval is granted upon finding that such action will not hamper the reorganization effort. *See* 11 U.S.C. § 362. The goal of the automatic stay of payment of pre-petition debts is to enable debtors, their creditors, owners and others to jointly formulate plans for the satisfaction of pre-petition claims (such as most of the claims for funding the Plans). *Perez v. Campbell*, 402 U.S. 637, 648 (1971). But PBGC appears to have assumed that upon its ordered restorations, LTV would—or at least should—recommence funding the Plans as if nothing had happened.

Most of the funding obligations, however, are pre-petition liabilities for past service rendered by covered employees, which obligations may not be payable without Bankruptcy Court approval. The existence of conflicts and restraints created by problems of the Bankruptcy Code ~~may well~~ render unilateral, unconditional administrative restoration, as attempted by PBGC, unworkable because, absent Bankruptcy Court approval, LTV cannot perform that which PBGC seeks to achieve in its Notice of Restoration. The record's failure to answer the question of feasibility reinforces the conclusion that PBGC's nonconsideration of those restraints was capricious.

PBGC's failure to consider and attend upon the alternative of restoration in the context of a plan of reorganization—which could serve to protect the interests of all concerned parties, including the agency itself—should make it impossible for this Court to conclude that the rescission of termination was the product of reasoned decision making. *Cf. State Farm*, 463 U.S. at 52. While an agency is not required to review every conceivable policy alternative, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978), it must consider those alternatives "within the ambit of the existing standard." *Id.*

It is at least arguably improper for an agency not to review less drastic policy alternatives. *See State Farm*, 463 U.S. at 46 and 51. Restoration as an incident of a plan of reorganization would be one example of such a less drastic alternative. However, for PBGC to craft restoration upon viable economic terms requires a searching examination of LTV Steel's ability to fund the Plans—a searching examination not engaged in by PBGC. What PBGC has done instead is to stubbornly insist upon adherence to a policy it has purportedly promulgated, that so-called "follow-on plans" are abusive of the pension insurance system.

4. *PBGC's conclusion that the Plans constitute abusive follow-on plans.* This case presents a problem PBGC has never addressed previously and has been unwilling to consider in a responsible manner throughout this proceeding. That problem is whether an entity like LTV, compelled by economic necessity to seek Bankruptcy Court protection in order to confront its many financial problems and the burden of its pension obligations, can be found to have established so-called abusive "follow-on plans," if, after its original Plans were involuntarily terminated, the company agreed to establish interim plans limited to the duration of the reorganization. As noted, LTV Steel's interim pension plans were part of a collective bargaining agreement, approved by the Bankruptcy Court, that had been negoti-

ated under the threat of a strike that would have affected LTV's ability to reorganize. PBGC has promulgated no regulations applicable to this situation, has issued no relevant opinion letters and, in fact, has refused to recognize the problem once it arose.

In recommending restoration of the Plans, the agency relied, at least in part, upon its conclusion that the Interim Agreement negotiated between LTV Steel and the Union, and thereafter approved by the Bankruptcy Court, created abusive follow-on plans, plans essentially the same as those that PBGC had terminated, but designed to pass a major portion of the financial burden from LTV Steel to PBGC.

As a basis for restoration, this conclusion is doubly defective: (i) the PBGC's administrative record failed to demonstrate near identity between the Plans terminated by PBGC and the interim plans, and (ii) ERISA's legislative history fails to condemn follow-on plans, if this is in fact what they are.

First, in affirming the District Court's finding that that agency's action was "arbitrary and capricious," the United States Court of Appeals for the Second Circuit concluded, "PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the [Interim Plans] were merely continuations of the old Plans." 875 F.2d at 1017. This failure by PBGC leaves a vacuum wholly unsupportive of the novel contention PBGC makes, namely that a reorganizing debtor's interim pension plans, established pursuant to a collective bargaining agreement and Bankruptcy Court approval, after termination of the preexisting Plans, constitute "abusive follow-on plans."

Second, even had the record here established that the court-approved interim plans were follow-on plans, the legislative history of the most recently enacted amendments to Title IV, the Pension Protection Act of 1987 ("PPA") (subtitle D of Title IX of the Omnibus Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987)) clearly shows that Congress considered *and rejected* the idea of outlawing "follow-on plans." In 1987 at least four Congressional

committees proposed legislation to amend Title IV. The legislation proposed by the Ways and Means Committee of the House of Representatives included a provision prohibiting "plan re-establishments." No other committee's bills included such a prohibition. This proposal was rejected by the Conference Committee. H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. at 879-85, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313 – 1625-31].

To the extent that Congress can be said to have spoken to abusive follow-on plans, its concern was that solvent, healthy employers might promise to increase plan benefits while shifting the major burden of pension payments to PBGC for an indefinite period by terminating the underlying plans. To the contrary, in situations such as the present one, Congress "[a]cknowledg[ed] that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 367 n.12 (1980).

The Court of Appeals recognized that Congress acknowledged that the situation in this case, in which an interim plan is approved by the Bankruptcy Court solely to further the reorganization effort, is not an abusive follow-on plan. 875 F.2d at 1016-17.

Furthermore, Congress never intended that restoration be ordered as a response to the creation of follow-on plans. 875 F.2d at 1017. Instead, Congress intended for section 4047 restoration to be ordered only when a company's financial circumstances were found to have improved, essentially reversing the statutory grounds for termination: the prospect of an unreasonable long-run loss to PBGC. *Id.* (*citing* H.R. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58). Congress continued this policy choice when it enacted the SEPPAA amendments to ERISA, Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986), and once again did not consider whether a follow-on plan constituted grounds for restoration. *Id.* (citing H.R. Rep. No. 241, 99th Cong., 2nd

Sess., pt. E at 51-55, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 709-713).

PBGC's reliance on its two opinion letters condemning follow-on plan abuse does not support its position. Both PBGC Opinion Letter 81-11 (May 11, 1981) (Pet. Appx. 159a-64e, and AR 198-202) and PBGC Opinion Letter 86-27 (December 17, 1986) (Pet. Appx. 172a-79a, and AR 211-16) deal with solvent employers attempting to use PBGC to subsidize the cost of ongoing plans for employees of an ongoing business. Both opinions claim, without any significant authority, that Congress intended for section 4047 to be used to remedy follow-on plan abuse. But even were that premise correct, neither opinion even suggests that the establishment of an interim plan, as an exigency of survival in reorganization proceedings under Bankruptcy Court supervision, is a proper ground for restoration.

The threatened national calamity, envisioned by PBGC and the Solicitor General and other *amici*—arising from LTV's actions in seeking the protection of the Bankruptcy Court to reorganize and to restructure its pension obligations—has not materialized. No major corporate entities have followed LTV Steel into bankruptcy merely to terminate their pension plans and to shift burdens to PBGC. The LTV cases stand alone in their impact upon the insurance system because of the amount of unfunded pension benefits. Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation, who have filed a brief *amicus curiae* in support of PBGC, have not followed LTV into bankruptcy, even though they have comparable pension obligations.

In context it becomes clear that PBGC has overreacted to the interim arrangement between LTV Steel and the Union that provides certain pension benefits that supplement the ERISA minimum guaranteed by PBGC *on a temporary basis, i.e.*, until the earlier of confirmation of a plan of reorganization by LTV Steel or April 1, 1990. Indeed, because of the present posture of the LTV reorganization cases and the unresolved claims of PBGC, LTV Steel must

soon commence negotiations with the Union for a new labor agreement.

In seeking to enforce its self-proclaimed policy against so-called "follow-on plans," PBGC has been blind to the consequences of its actions which have delayed the reorganization of LTV to the disadvantage of its many thousands of creditors, equity holders and work force. But for this stubborn adherence to policy by PBGC these bankruptcy cases could have produced a consensual plan of reorganization during the three and one-half years since the filing.

5. *PBGC's September 22, 1987 pre-ordained restoration action.* On September 22, 1987 the Principal Deputy Executive Director of PBGC (Dellinger) met with LTV representatives considering various "options" that the agency then apparently believed it had. AR 1575-76. Dellinger had earlier enumerated the possible alternatives, on September 14, 1987, in a letter to Raymond Hay of LTV, stating that the "options", as purportedly seen by PBGC, were (1) restoration, (2) equitable adjustment, *i.e.* reducing PBGC payment to retirees to reflect payments made by LTV, (3) continuation of existing litigation, and (4) to do nothing. AR 668-69. Yet the administrative record is devoid of any internal agency references to any option other than restoration. One month before Dellinger's letter, on August 13, 1987, PBGC staff already had recommended immediate restoration, and had not outlined a single alternative form of action. AR 630-36. The staff reiterated the recommendation without modification on September 18, 1987. AR 640-45.

The illusory—and misleading—suggestion that PBGC, in good faith, gave due consideration to alternatives to restoration is dramatically demonstrated by PBGC's Executive Director Utgoff's September 22, 1987 Notice of Restoration—issued the very day of the PBGC-LTV meeting discussing "options"—which Notice was effective at 10:30 that morning and was specified to be "not subject to administrative review by the PBGC...." Compare AR

1575-76 with 1578-79.

Dellinger, on that very day, had "reiterated" to the LTV representatives that "we would give them as much advance notice as possible"! AR 1576.

D. PBGC's Failure to Have Accorded Procedural Due Process Vitiates Its Notice to Restore.

This Court has consistently ruled that delegations of authority by Congress to administrative agencies do not deprive the judiciary of its responsibilities—soundly exercised here by the Courts below—to police and curtail unbounded administrative power. *See, e.g., Burlington Truck*, 371 U.S. at 167 ("Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body"); *Bowen v. Georgetown University Hospital*, ___ U.S. ___, 109 S. Ct. 468, 474 (1988); *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988); *New Haven Inclusion Cases*, 399 U.S. 392, 432-33 (1970); *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 91-92 (1968); *National Labor Relations Board v. Metropolitan Life Insurance Company*, 380 U.S. 438, 442-43 (1965); *United States v. Merz*, 376 U.S. 192, 198-99 (1964).

PBGC's failures, noted by the Court below—to have informed LTV of the materials on which it was to base its decision, to provide an adequate opportunity to tender contrary evidence, to utilize ascertainable standards in evaluating LTV's financial condition, to provide a statement of its reasoning, and the like (875 F.2d at 1021)—render reasoned judicial review of PBGC's actions impossible. Indeed, these arbitrary actions, threatening to deprive all LTV entities including the Equity Committee of assets in which all have a stake, are violative of that due process guaranteed by the Fifth Amendment to the United States Constitution. *See Matthews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individ-

uals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment"); *cf. Atkins v. Parker*, 472 U.S. 115, 128 (1985) ("[T]he procedures that are employed [administratively, re the food stamp program] must comply with the commands of the Constitution").

Considering PBGC's entire procedural record here, the Court of Appeals noted:

> [W]hen assessing an agency's actions under the arbitrary and capricious standard, it is a principle of fundamental fairness that
>
> > [a] party is entitled...to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that [it] may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.
>
> *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4, (1974).

875 F.2d at 1020-21.

If this Court, as here urged, affirms the action below, denying PBGC's motion for summary judgment (which, essentially, sought enforcement of its Notice of Restoration), the matter will thereby be remanded to PBGC. It, acting pursuant to relevant provisions of the APA, can then appropriately evaluate LTV's financial condition and explore the interplay of ERISA, the bankruptcy law (and LTV's position in Chapter 11) and the labor law, and can consider LTV's ability to fund the Plans. Some rapprochement among competing interests can then be accomplished. But if not, at least due process will arguably have

been accorded LTV, its creditors and equity holders, with a full record—allowing for sound judicial review—having been made.

Thus the Court of Appeals for the Second Circuit soundly affirmed the remand order and held that PBGC's reading of ERISA section 4047 was unreasonable. The statutory language, legislative history and decisional law all fail to support the conclusion that restoration of the Plans as directed by PBGC, was appropriate under section 4047. Indeed, such conclusions as PBGC apparently reached, as predicates to its restoration directive, are patently unsound.

CONCLUSION

The action of PBGC having been arbitrary and capricious and neither in compliance with the standards set forth in the Administrative Procedure Act nor in accord with Constitutional due process, the decision of the United States Court of Appeals for the Second Circuit should be affirmed and the matter remanded to the Second Circuit for its action, essentially causing PBGC to withdraw its restoration directive and to conduct appropriate administrative proceedings.

Respectfully submitted,

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Dated: January 16, 1990

APPENDIX

APPENDIX A

Administrative Procedure Act

5 U.S.C. §554. Adjudications

* * *

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

5 U.S.C. §556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

* * *

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. §557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

* * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or
(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;....

FOR ARGUMENT

(26)

No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,

Petitioner,

vs.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LTV BANK GROUP

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Does section 4047 of ERISA, 29 U.S.C. § 1347, authorize the Pension Benefit Guaranty Corporation ("PBGC") unilaterally to seize from the courts control over a vital aspect of the reorganization of LTV Steel Company, Inc. ("LTV Steel") and The LTV Corporation (collectively, "LTV") under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.*, by:

   a. restoring without prior court approval three pension plans terminated by district court order only eight months earlier, and whose termination was upheld by the court of appeals just two months before; and

   b. substituting its judgment for the holding of the bankruptcy court only two months earlier, reached after full and fair consideration of the PBGC's views and an evidentiary hearing, that interim pension plans established by LTV in 1987 pursuant to statutorily authorized collective bargaining and in settlement of a lawsuit (the "1987 CBA plans") were not unlawful?

2. Assuming the PBGC may in appropriate circumstances order restoration without prior court approval, did the court of appeals err in affirming the district court's order vacating the PBGC's Notice of Restoration where:

   a. the PBGC's decisionmaking process was fundamentally flawed by its failure even to consider critical competing policies of federal bankruptcy law, labor law, and ERISA affected by restoration;

   b. the PBGC's primary purported basis for restoration, that "follow-on plans" are an abuse of ERISA and that the 1987 CBA plans are "follow-on plans," was in error as to both aspects;

   c. the administrative record reveals the PBGC had decided to restore on the "follow-on plan" rationale

whether or not there was any basis for its alternative purported rationale of a material improvement in LTV's financial condition, and ignored its own rules and past analysis in seizing upon that erroneous alternative justification;

d. the PBGC's administrative record did not provide a rational basis for the conclusions drawn by the PBGC; and

e. the procedures by which the PBGC arrived at its decision were grossly inadequate because the PBGC did not apprise LTV or its creditors of the factors on which it would base its decision, give LTV or its creditors an adequate opportunity to offer contrary evidence, proceed under ascertainable standards, include in the record important information necessary to explain its decision, or provide a statement of its reasoning?

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LTV BANK GROUP

COUNTER STATEMENT OF THE CASE

LTV's Chapter 11 Petition and the Termination of the LTV Steel Plans

On July 17, 1986, The LTV Corporation and its affiliated debtors, including the LTV Steel Company, Inc., filed petitions for reorganization under Chapter 11 of the Bankruptcy

Code, 11 U.S.C. §§ 1101 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York. At the time of LTV's Chapter 11 filing, LTV Steel was the second-largest steel company in the United States. Pet. App. 36a.[1] It was created by the merger of Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company, and Republic Steel Corporation. Pet. App. 36a.

Respondent LTV Bank Group (the "Bank Group") is among the largest of LTV's creditors, having filed proofs of claim totalling more than $925 million.[2] The largest creditor is the PBGC, which claims more than $2 billion as guarantor of four terminated LTV Steel pension plans, the Consolidated Pension Plan for Salaried Employees of Jones & Laughlin Corporation and Subsidiary Companies, Jones & Laughlin Pension Plan (Hourly), Pension Plan of Republic Steel Corporation Dated and Effective as of March 1, 1950 (Hourly), and the Republic Steel Salaried Plan. The PBGC has issued a Notice of Restoration against only the first three of these plans (collectively, "the Plans").

The inability of LTV Steel to meet its funding obligations under the Plans was a primary cause of the financial difficulties leading to its Chapter 11 filing. The plant closings and layoffs

[1] The designation "Pet. App." refers to the Appendix to Petition for Writ of Certiorari, filed with this Court on September 11, 1989. References in the form "JA" are to the Joint Appendix filed on December 14, 1989. Citations to "AR" refer to portions of the administrative record not contained in the Joint Appendix.

[2] The LTV Bank Group consists of many of the major banking institutions in the country, namely Mellon Bank, N.A., for itself and as agent, Manufacturers Hanover Trust Company, for itself and as agent, Bankers Trust Company, Continental Illinois Bank and Trust Company of Chicago, Marine Midland Bank N.A., The Chase Manhattan Bank, N.A., Bank One Columbus, N.A., Security Pacific National Bank, First Republic Bank of Dallas, N.A., MBank Dallas, N.A., Morgan Guaranty Trust Company of New York, Pittsburgh National Bank, Ameritrust Company, N.A., National Bank of Detroit, The Philadelphia National Bank, Norwest Bank Minneapolis, N.A., First Pennsylvania Bank, N.A., National City Bank, First City Bank of Dallas, First Republic Bank, Houston, The Royal Bank of Canada, and First Wisconsin National Bank of Milwaukee.

it had undertaken for the stated purpose of lowering its operating costs led both to massive increases in its pension obligations and to a reduction in its ability to meet those obligations. By 1986, LTV Steel was paying benefits to three retirees for every active worker participating in its pension plans. Pet. App. 37a. Its unfunded liability for future pension benefits exceeded $2 billion. Pet. App. 37a-38a; AR 708-09. In 1985, LTV Steel applied for and received from the Internal Revenue Service, under section 412(d) of the Internal Revenue Code, 26 U.S.C. § 412(d), a waiver of its $175 million minimum funding requirement for the 1984 plan year. The waiver permitted the company to amortize its 1984 pension contribution over a fifteen year period. When LTV Steel's financial difficulties continued in 1986, it sought additional waivers of the more than $205 million it owed for the 1985 plan year and under the amortization agreement for the 1984 plan year. In November, 1986, the IRS ultimately denied that request, revoked the waiver of LTV Steel's 1984 payment obligation, and made the company immediately liable for more than $350 million in contributions for the two years. Pet. App. 37a-38a; JA 122, 233.

In the meantime, on April 1, 1986, LTV Steel signed a collective bargaining agreement with the United Steelworkers of America ("USWA"). The USWA there agreed to concessions which reduced labor costs. Pet. App. 38a.

In September 1986, two months after LTV's Chapter 11 filing, the PBGC invoked the mandatory involuntary termination provisions of ERISA section 4042, 29 U.S.C. § 1342, to obtain court approval to terminate the Republic Steel Salaried Plan. That plan did not have assets to pay benefits when currently due. JA 122.

Thereafter, the PBGC considered whether to take the same action with respect to the three other LTV Steel Plans. The Plans' financial condition was deteriorating. Because LTV Steel's Chapter 11 filing triggered the automatic stay imposed by section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), it was

barred from paying pre-petition debts, including Plan contributions, without bankruptcy court approval. Yet those already-underfunded Plans were distributing approximately $31 million each month to participants.

Although the PBGC's skimpy administrative record does not reveal precisely what the PBGC did,[3] it does disclose a December 15, 1986 meeting of the PBGC's SEPPAA Trusteeship Working Group (the "Working Group"). There, the PBGC's own analyst, Mike Wells, presented an overview of LTV's financial situation.

Mr. Wells was aware LTV expected to have significant operating income and to build up cash, in substantial part due to the bankruptcy stay on payment of pre-petition obligations. For example, LTV's 1987-1988 Operating Plan anticipated operating income would be $426 million in 1987, much of it resulting from the "realization of certain costs avoided in the Chapter 11 environment." JA 16-17. Anticipated operating income for 1988 was another $411 million. JA 18. LTV specifically noted these figures could be even greater if there were stronger than expected GNP growth, favorable government policy initiatives, cost reductions in excess of planned levels, continued or new work stoppages at major competitors, a cold winter, disposals of non-operating units, or improvement in the steel market. JA 20-21, 34, 53. Just a 1% change in average selling price or costs due to these factors would reportedly generate a $41 million change in operating income, while a similar change in volume would change operating income a further $8 to $11 million. JA 52.

Nevertheless, the PBGC's analyst recognized LTV's short-term income and cash buildup would not warrant continuation of the Plans. On the contrary, he concluded "the probability that LTV can survive with the Plans intact is 'de minimis.' " JA 122. The PBGC Working Group identified five key elements of the Plans' cash flow situation for "analysis before making a recommendation on involuntary termination":

[3] Moreover, the PBGC has redacted even its limited memoranda on purported privilege grounds. *E.g.*, JA 130-31, 139.

"a. Estimated annual increased loss if the Plans continue;

b. Estimated amount of benefits being paid above guaranteed levels;

c. Estimated amount of contributions required to bring the funding standards account into compliance;

d. Estimated annual amount of contribution required to maintain the funding standards account; and

F. [sic] Estimated cost of shutdown benefits."

JA 123. There was also to be an analysis of "[e]stimated cost per labor hour to carry the Plans," "[e]stimated cost of labor per ton of steel produced and the percentage the Plans represent per ton," "plants projected to be shutdown and their estimated date," "the [PBGC's] recovery of employer liability under SEPPAA," and "LTV's ability to make required contributions," with a particular "need[ ] to concentrate on LTV's ability to fund the Plans on an ongoing basis to prevent their financial condition from deteriorating further." JA 123-24.

In addition, the PBGC Working Group assigned one of its number to "obtain written confirmation from LTV of their intent to make future contributions with respect to the Plans." JA 124. In response, on December 16, 1986, LTV formally notified the PBGC "because LTV is currently in reorganization under Chapter 11 of the Bankruptcy Code, LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies" and "LTV does not intend, and is not likely to have the ability, to fund the Plans for future years." JA 126.

The PBGC Working Group's minutes reflect its continued focus, in determining whether to seek court approval involuntarily to terminate the Plans, on their long term viability, as opposed to "pay-as-you-go" status. *See* 29 U.S.C. § 1002(31); 26 C.F.R. § 1.401-1(b)(2). Thus, while the Group was informed by one of its analysts that "[t]he Plans have assets to carry them

for approximately 4 to 5 years without additional contributions" and "[t]he estimated increase in the underfunding [of the Plans] is approximately $13 million on an annual basis," they were also told the Plans' "estimated underfunding . . . without shutdown benefits [was] $2.4 billion" and "[t]he amount being paid to retirees and beneficiaries under the Plans is approximately $30 million per month of which an estimated $3 million per month is being paid in excess of guarantees." JA 129. Moreover, the PBGC Group recognized even two years of successful LTV operations would not turn things around, and the PBGC could not permit the continuation of the Plans if that would be incompatible with a plan of reorganization under Chapter 11:

> "[A] planned cash buildup of just over $1 billion by the end of 1988 [*i.e.*, at the end of two years] would not be sufficient to finance a plan of reorganization and the ongoing Plans. The group thus concluded that termination would occur; the relevant question was whether it would be now or later."

JA 129. As yet another PBGC analyst concluded: "LTV could not afford to maintain the Plans under their own optimistic projections." JA 129.

On January 5, 1987, the Working Group unanimously recommended "that the plans be involuntarily terminated due to failure to meet the minimum funding standards and to avoid unreasonable deterioration of the financial condition of the plans." JA 140. In light of the PBGC's finding that "[t]he Plans have assets to carry them for approximately 4 to 5 years without additional contributions," JA 129, this decision to seek termination immediately reflected the PBGC's conclusion that a long term perspective is required on the question whether or not to terminate, in keeping with ERISA's concern with "permanent as distinguished from . . . temporary program[s]." 26 C.F.R. § 1.401-1(b)(2); 29 U.S.C. § 1002(31). The January 5 PBGC minutes note that in addition to estimated "due and unpaid employer contributions [of] $385 million as of December 31, 1986 . . . [t]he future contributions requirement for the Plans is $185 million annually." JA 138.

On January 12, 1987, without prior notice to any Plan participants, the PBGC brought an action in the United States District Court for the Southern District of New York, under section 4042 of ERISA, 29 U.S.C. § 1342, to terminate the Plans and be appointed statutory trustee. LTV did not object to the termination. The district court entered consent orders of termination as of January 12, 1987. JA 141-42. That same day, the PBGC recited in papers filed with the bankruptcy court: "the Debtors are apparently at this moment sitting on over $500 million of surplus cash" and "project that LTV and its affiliates will have on a consolidated basis approximately $740 million of cash on hand at the end of 1987 and $1.1 billion at the end of 1988." *See* Objection to Application by Debtors re: Stipulation and Agreement to Provide Post Petition Credit and Resolve Certain Controversies and Demand For Hearing Thereon, dated January 12, 1987, at 8.

As a result of the Plan terminations, the PBGC took control of all Plan assets and became responsible for paying Plan benefits to the extent of the statutory guaranty in ERISA. *See* 29 U.S.C. § 1322. The terminations also liquidated the PBGC's previously contingent claims against the debtors to recover money paid pursuant to its guaranty. The PBGC has filed claims exceeding $2 billion. *See* December 30, 1987 letter from Frank H. McCulloch to Frank Cummings, Exhibit 3 to the Affidavit of James F. Powers, dated January 14, 1988 (page 144 of Joint Appendix filed in the Court of Appeals). If the Plans remain terminated, these claims will be paid pursuant to a plan of reorganization along with those of all other creditors, including the Bank Group. Pet. App. 23a-24a.

The 1987 Interim Collective Bargaining Agreement

The post-termination benefits paid by the PBGC under its statutory guaranty excluded many agreed to in the USWA's pre-Chapter 11 collective bargaining agreement with LTV Steel, such as disability, surviving-spouse, and early retirement benefits. Pet. App. 42a. The USWA launched a three-pronged attack against the benefit cuts. First, it challenged the Plan termination orders in court, appealing unsuccessfully to the court of appeals. *See*

Jones & Laughlin Hourly Pension Plan v. LTV Corp., 824 F.2d 197 (2d Cir. 1987), and *Jones & Laughlin Retirement Plan v. LTV Corp.*, 824 F.2d 202 (2d Cir. 1987). Next, the USWA sued LTV Steel in bankruptcy court, seeking an injunction to compel payment of the non-guaranteed portion of Plan benefits. The PBGC intervened in opposition to the USWA's application, once again recognizing the primacy of the reorganization process over any pre-petition benefit obligations. Thus, the PBGC argued that requiring "the Debtor to continue to pay the pre-petition claims of retirees outside of a Chapter 11 plan of reorganization" would be inconsistent with ERISA and "would pervert . . . the collection scheme for pre-petition debt embodied in the Bankruptcy Code." *See* Pet. App. 43a.

The third and potentially most damaging weapon available to the USWA was a crippling strike. This was no idle threat: the USWA had already struck another Chapter 11 debtor, the Wheeling-Pittsburgh Steel Company, for ninety-one days, over its failure to pay post-termination pension benefits.[4] Moreover, immediately after LTV's Chapter 11 filing, the USWA had struck LTV Steel's most important facility because of the company's initial inability to pay retiree medical benefits. Pet. App. 43a-44a. LTV estimated another strike now would cost the company $100 million per month. That risk was considered unacceptable. Pet. App. 44a. As a witness called by the PBGC at a bankruptcy court hearing later testified, "the costs of a strike were unbelievably high. . . . [I]t was almost a bet the company type proposition whether the company should take on a strike." JA 258.

LTV Steel and the USWA discussed a compromise. After weeks of intense and complicated negotiations, a tentative agreement was reached on May 13, 1987. But the presidents of the USWA locals rejected it. Pet. App. 44a. The parties edged closer to a strike before bargaining resumed. Six weeks later, on June 25, the local presidents narrowly approved an interim collective bargaining agreement to be effective until a plan of reorganization of LTV is approved, subject to termination by either LTV

[4] The USWA also struck USX for six months. JA 153.

Steel or the USWA if "any of its provisions become unenforceable" or if the PBGC stops paying the guaranteed Plan benefits. Pet. App. 44a.

The 1987 CBA required LTV Steel to provide new retirement benefits for current employees and to adopt new plans that make up in varying degrees some of the benefits whose loss by retirees produced the greatest hardship when the PBGC took over the Plans. The estimated total annual cost to LTV Steel was $70-$75 million. In return, the USWA agreed to what the company believed would be labor peace, job consolidations, other work rules changes, insurance copayments and the settlement of the USWA's lawsuit for back benefits without additional payment from LTV Steel. Pet. App. 45a. The estimated savings to the company were approximately $50 million. Comparable programs were also provided for the salaried work force. AR 247-48.

The 1987 CBA plans are different from the terminated Plans. Most importantly, none is a defined benefit plan subject to any PBGC guaranty. *See* 29 U.S.C. § 1321(b)(1). On the contrary, the basic plan for active employees is a defined contribution plan.[5] Workers and retirees covered by the new plans also face new burdens. For example, they must share for the first time the cost of health insurance through copayments deducted from their checks. In addition, the new plans contain certain more restrictive eligibility requirements, and some benefits are not necessarily proportional to length of service. Pet. App. 109a.

Before the 1987 CBA was signed, the PBGC informed LTV of its objection to the new plan benefits, on the ground they made up for lost benefits under the terminated Plans. Pet. App. 49a. However, the PBGC was unwilling or unable to specify its objections beyond the broad characterization that the new plans

[5] In a defined contribution plan, separate accounts are created for each worker who, at retirement, becomes entitled only to the benefits which can be purchased by the money in his or her account. *See* AR 301. By contrast, a defined benefit plan is intended to provide each worker with a predetermined monthly benefit payable for his lifetime. AR 1180-86, 1327-40, 1435-46.

were "abusive." AR 523-24, 658. Nor did the agency institute formal rulemaking or adjudicatory proceedings to address the new plan issue. Moreover, the alleged abusiveness of the 1987 CBA plans was the only issue discussed in those conversations; neither LTV Steel's financial status nor its shutdown projections were discussed. AR 523-24, 658.

On July 8, 1987, LTV Steel, supported by the Bank Group and other major creditors, applied to the bankruptcy court for approval of the 1987 CBA. At the hearing, two LTV witnesses testified without contradiction that the interim 1987 CBA was necessary to avoid a crippling strike and to permit LTV and LTV Steel to reorganize. Pet. App. 45a.

The PBGC led the opposition. It submitted affidavits from two of its officials, objecting to portions of the 1987 CBA plans on the ground they constituted a *de facto* restoration of the terminated Plans in violation of PBGC policy. JA 226-37. But the financial advisor to the Creditors' Committee, called by the PBGC, testified he did not believe a better agreement could have been reached, AR 554; LTV Steel would nevertheless have difficulty surviving, AR 546-48; and the "bet the company" risk of a strike was unacceptable. AR 549.

On July 16, 1987, the bankruptcy court approved the 1987 CBA, finding it "clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 debtor." JA 260. The court's oral opinion noted the special treatment afforded collective-bargaining agreements under bankruptcy law, JA 260, and stressed that both its ruling and the 1987 CBA were interim measures addressing the needs of the ongoing reorganization. JA 261.

Eight times, the PBGC tried unsuccessfully to stay approval and implementation of the 1987 CBA. Pet. App. 46a. The PBGC appealed to the district court the bankruptcy court's July 16, 1987 order approving the 1987 CBA, again raising the "abuse" argument. However, the PBGC later withdrew its appeal. *Id.* Frustrated by the rejection of its arguments in the courts, the PBGC apparently decided to take matters into its own hands.

Initially, the PBGC redoubled its efforts to persuade Congress to amend ERISA to preclude an employer "from establishing retirement programs which in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits." JA 236; H.R. 3545, 100th Cong., 1st Sess. at 1221 (1987). That effort was unsuccessful.

The PBGC also pushed for amendments to ERISA, ultimately adopted as the Pension Protection Act of 1987 ("PPA"), which greatly expanded the PBGC's claim against sponsors of terminated pension plans.[6] The PPA increased the PBGC's claim from 75% of unfunded PBGC-guaranteed plan benefits to 100% of unfunded benefits, whether guaranteed or nonguaranteed. But the PPA did not apply to the termination of the LTV Steel Plans, which occurred before the effective date of the Act. However, if the LTV Plans were restored and subsequently reterminated, and the PPA was held applicable to the retermination, the PBGC's claim against LTV could increase by more than $800 million.[7]

The PBGC's Flawed Decision to Restore the Terminated Plans

On August 6 and 10, 1987, less than a month after the bankruptcy court's July 16 ruling, and while the PBGC's effort to change the law was ongoing, the Working Group met to consider, and then approved, the unilateral restoration of the Plans.

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[6] Subtitle D of Title IX to the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987).

[7] LTV has estimated the total PBGC claim for unfunded guaranteed benefits, under the law existing at the time of termination, amounts to approximately $1.817 billion. Under the PPA, the PBGC could claim 100%, rather than 75%, of the unfunded guaranteed liability, increasing its claim by over $600 million. In addition, the PBGC could claim another $200 million in nonguaranteed benefits. Affidavit of James F. Powers, dated January 14, 1988 (page 144 of Joint Appendix filed in the Court of Appeals).

JA 312.[8] The PBGC's scanty minutes note its prior decision "involuntarily [to] terminate[]" the Plans had been made seven months earlier, in January 1987, "due to the Plans' failure to meet minimum funding standards and to avoid unreasonable deterioration of the Plans' financial condition." JA 313. However, the minutes fail to reveal any analysis of most of the key elements of the Plans' status which the PBGC had found so critical in deciding to terminate. *See* pages 4-6 above. Nor do they even discuss the long term perspective and the need to consider whether LTV's financial performance would "be sufficient to finance a plan of reorganization and the ongoing Plans," JA 129, which the PBGC itself had recognized to be the standard back in January, 1987, when the agency was not concerned about having been thwarted in its opposition to the supposedly "abusive" 1987 CBA plans.

The PBGC Working Group's primary cited basis for restoration was in fact its "abusiveness" argument, which had already been presented unsuccessfully to the bankruptcy court. JA 314. To be sure, "the improvement in LTV's financial condition" was also given as a ground for restoration. But the PBGC did "not have sufficient data to predict LTV Steel's long-term cash flow with any certainty," and could only conclude LTV "will generate more than enough cash *in the immediate future* to support the Plans if restored," after assuming without explanation that waivers of contributions already denied by the IRS could be obtained for the 1984 and 1985 Plan years. JA 317-18 (emphasis supplied).

The only other PBGC "financial analysis" included in its meager administrative record is also superficial. The September 15, 1987 memorandum did not even "attempt[ ] to project economic or other factors that will affect LTV in the future." JA 343. It added the "assum[ption]" without explanation that "in the event of restoration, the [1987 CBA] is voided by one

[8] The Group's August 13, 1987 memorandum recommending restoration of three Plans explained "[t]he Group did not decide to include the Republic Retirement Plan (Republic Salaried Plan) at this time since PBGC expects to recover 100 percent of the plan asset insufficiency for this plan." JA 328, 329.

of the parties, but that further bargaining preserves [its] job reductions" savings of $50 million. JA 344. Moreover, it reviewed financial data for only the five month period from January to May 1987 beyond what the PBGC had considered in deciding to terminate the Plans at the beginning of the year. JA 344. There was no reported consideration that the $45 million positive variance between LTV Steel's predicted and actual operating income during those five months — on which the PBGC's entire "financial analysis" was now premised — occurred at a time when a prime competitor, USX, was disabled by a strike which would not (and did not) continue indefinitely. Despite all this, the most the PBGC could say was that a "plausible case can be made" that LTV Steel could support the Plans. JA 345.

LTV had no chance to respond to this finding of material financial improvement. The PBGC minutes purport to show it was a basis for restoration as early as August, JA 318, but the PBGC never so notified LTV. Even when the PBGC's Executive Director wrote on September 18, 1987 to inform LTV the PBGC would consider "any additional information you might wish to supply," she made no reference to the company's ability to maintain the plans. Quite the contrary, she implied the only issue was the effect of the 1987 CBA plans, by reminding LTV it had already been given an opportunity to present information prior to the bankruptcy hearing in July 1987 when the 1987 CBA plans were the only issue. JA 348. Consistent with this, the PBGC's draft Executive Summary prepared in September 1987 — which the PBGC now claims was inadvertently included in its administrative record — states the PBGC would have recommended restoration "in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed." JA 350-51.

On September 22, 1987, the PBGC restored the Plans effective as of the date of their termination. The Notice of Restoration cited three purported bases for restoration: (1) LTV's "abuse" of ERISA in establishing the post-termination programs negotiated with the USWA and approved by the bankruptcy court; (2) "LTV Steel's improved financial circumstances"; and (3) "LTV Steel's demonstrated willingness to fund employee

retirement arrangements." Pet. App. 182a-183a. No further explanation or analysis was provided in the Notice.*

Proceedings Below

On September 23, 1987, one day after the PBGC issued its Notice of Restoration, LTV obtained an order to show cause from the bankruptcy court, seeking to void the Notice as a violation of the automatic stay under section 362 of the Bankruptcy Code. Two weeks later the PBGC filed an enforcement action in the United States District Court for the Southern District of New York. The two actions were consolidated. The Bank Group and other LTV creditors were permitted to intervene. Pet. App. 51a-52a. Thereafter, motions for summary judgment were filed.

The district court issued its decision on June 22, 1988. The court held that the enforcement action was not barred by the automatic stay, and that under certain circumstances the PBGC was empowered to restore plans without prior judicial approval. But the district court vacated the PBGC's Notice of Restoration, finding the agency had acted arbitrarily and capriciously in a number of important respects:

1. "[T]he PBGC's abuse theory as it relates to post-termination replacement plans [is] necessarily contrary to congressional intent," and the record does not establish the 1987 CBA plans were abusive. Pet. App. 99a-110a.

2. The PBGC improperly ignored LTV's obligation under labor and bankruptcy law to bargain collectively with the USWA concerning pension and retirement benefits, and the ERISA policy favoring the payment of benefits in excess of the statutory guaranty. Pet. App. 102a-106a.

3. The record does not support PBGC claims that LTV Steel's financial condition had improved sufficiently to warrant restoration, nor the PBGC's two critical assumptions that LTV could

* The PBGC has since conceded the "willingness to fund" factor is properly subsumed within the other two, and is not an independent basis for the Notice of Restoration. Pet. App. 25a. Accordingly, this factor is not discussed separately here.

obtain minimum-funding waivers from the IRS and that the USWA would allow LTV Steel to retain the $50 million 1987 CBA concessions if the 1987 CBA plans were removed. Pet. App. 110a-118a. Moreover, the PBGC should have recognized ERISA requires the long-term viability of pension plans, not merely the short-term ability to pay benefits, and the extent to which LTV Steel's status as a Chapter 11 debtor affected its balance sheet and its ability to fund pension plans. Pet. App. 112a-117a.

4. The PBGC's restoration procedure was inadequate because the agency did not develop a complete reviewable record; did not set forth its standards with sufficient clarity to permit LTV to challenge them; did not adequately apprise LTV of the grounds for restoration; and did not afford LTV a sufficient opportunity to rebut those grounds. Pet. App. 123a-128a.

The district court remanded to the PBGC for further consideration consistent with its opinion, ordering the agency to limit its analysis to whether LTV was financially able to fund the Plans if restored, consistent with principles of ERISA and bankruptcy law. Pet. App. 130a-131a.

The court of appeals affirmed unanimously. The court found the PBGC focused inordinately on ERISA, failing to consider bankruptcy and labor policies. Moreover, adoption of the 1987 CBA plans did not justify restoration of the terminated Plans. Pet. App. 17a. Nor did "the administrative record . . . support PBGC's finding that LTV's financial circumstances had improved substantially enough to justify restoration": the PBGC could not support its key assumptions about the availability of IRS funding waivers and USWA willingness to allow LTV Steel to retain the $50 million in concessions after restoration; LTV's cash reserves were the natural result of the reorganization proceedings and did not reflect any newfound prosperity; five months' operating income did not establish LTV Steel had the long-term ability to fund the restored Plans; and ERISA's overriding focus is in all events on the long-term viability of plans and there is an unacceptable risk of retermination if the PBGC is allowed to restore plans based on their short-term cash surplus while in Chapter 11 reorganization. Pet. App. 21a-25a. In

addition, the PBGC's procedures for restoration were inadequate because the agency "neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying these standards. Failure to do any of these things renders the decision arbitrary and capricious." Pet. App. 26a.

SUMMARY OF ARGUMENT

1. The PBGC exceeded its authority when it purported to restore the Plans through unilateral administrative action without prior court approval. ERISA section 4047 does not grant the PBGC unbridled discretion to restore plans whenever it wishes. Rather, when read in context with the rest of Title IV of ERISA, it authorizes restoration of plans which have been terminated by court order only upon application to the court that approved the termination and a showing that the factors justifying termination have changed. Any other construction of section 4047 would produce an irreconcilable conflict with ERISA sections 4041(c) and 4042(c), which give the court the final authority to determine whether an underfunded plan of an employer undergoing reorganization can be terminated. The PBGC would have an improper veto power over the termination of plans which have satisfied all the statutory criteria for termination, including court approval.

2. Even assuming the PBGC has the authority to order restoration under appropriate circumstances, its restoration of LTV Steel's Plans was arbitrary and capricious.

a. In evaluating restoration, the PBGC improperly failed to consider numerous critical factors such as competing statutory policies under the bankruptcy and labor laws; whether there were means of dealing with the 1987 CBA plans less disruptive of the reorganization process, such as appealing the bankruptcy court decision approving the interim plans; the statutory criteria of ERISA sections 4041 and 4042 governing plan terminations; ERISA's overriding policy favoring the fullest possible pension plan coverage for workers and retirees; and whether the PBGC, as LTV's largest creditor, was improperly motivated by a desire to obtain an unauthorized preference and to increase the value of its own claim.

b. The PBGC improperly characterized the 1987 CBA plans as "abusive" as a basis for restoring the terminated Plans. After repeatedly failing to persuade three separate courts that the 1987 CBA plans were abusive, the PBGC may not achieve the same result through administrative procedures which fail even to consider the courts' reasons for ruling against the PBGC. Congress has responded to the risk of abusive termination by enacting strict limits on plan terminations, not by granting the PBGC standardless discretion to restore plans whenever it perceives an "abuse." Moreover, the PBGC's claim that the 1987 CBA plans are "abusive for providing benefits in excess of the statutory guarantee" conflicts with its own position in *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982), in which the PBGC filed a brief arguing that nothing in ERISA imposes a cap on the payment of non-guaranteed benefits.

The PBGC's finding of "abuse" also conflicts with many statutory policies. Congress has repeatedly amended ERISA to enable workers in terminated plans to obtain benefits in excess of the statutory guaranty, and rejected a proposal to ban follow-on plans for five years after a termination. Moreover, federal labor law requires companies in reorganization to bargain over the benefits provided by the 1987 CBA plans.

Nor does the administrative record support the PBGC's conclusion that the 1987 CBA plans are "abusive." The PBGC analysis which concluded that the 1987 CBA plans continued the terminated Plans, looked only to the similarities and did not acknowledge, let alone distinguish, the differences.

c. The administrative record establishes the PBGC would have restored the Plans regardless of whether LTV's finances had improved enough to resume funding the terminated Plans.

The record does not in any event support a finding of sufficient improvement. The PBGC failed to follow its own standards and rules for evaluating LTV's financial health; disregarded ERISA's mandate that plans be viable over the long run in favor of a standard focusing entirely on short-term ability to pay; relied on evidence already known to the agency at the time of termination and on misleading extrapolations from inadequate data; ignored the effects of bankruptcy law on LTV's cash position and the rights of LTV's other creditors; and did not consider the risk of retermination. Moreover, the PBGC's conclusion improperly rests on two unsupported and unsupportable assumptions: that the IRS would grant LTV Steel funding waivers it had previously denied, and that the USWA would allow LTV Steel to retain $50 million in concessions made specifically in return for the "abusive" 1987 CBA plans.

3. Deficiencies in PBGC procedures also rendered its decision to restore arbitrary and capricious. The PBGC never informed LTV of the standards it would use to define "abuse" or "financial improvement," and never notified LTV the agency was even considering restoration based on alleged financial improvement. Moreover, the record compiled by the PBGC omits all testimony and judicial findings contrary to the PBGC's conclusion, and shows signs of having been edited to conceal that the PBGC would have ordered restoration regardless of LTV's finances.

ARGUMENT

I. THE PBGC LACKS THE AUTHORITY TO RESTORE LTV STEEL'S PENSION PLANS WITHOUT PRIOR COURT APPROVAL

The threshold question for this Court in reviewing the PBGC's restoration of the Plans is whether the agency "acted within the scope of [its] authority." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The PBGC claims to derive from section 4047 of ERISA, 29 U.S.C. § 1347, authority unilaterally to restore the Plans without court order even though they were terminated by court order. Br. Pet. 20-23, 33; *see also* Brief for

the United States as *Amicus Curiae* at 6 n.3. The PBGC argues it may at will restore any single-employer plan terminated by court order, subject only to limited court review of whether the restoration was arbitrary and capricious as measured solely by the PBGC's own interests. In support, the PBGC cites inconclusive fragments of the legislative history, which the district court found "offers little guidance as to the intended scope of the PBGC's restoration authority." Pet. App. 86a n.25.

The PBGC's position is wrong: the agency has acted beyond the scope of its authority in restoring the Plans without court approval, and its Notice of Restoration had to be vacated for this reason alone. Section 4047 actually provides only for the PBGC, "consistent with its duties under this subchapter, to take such action as may be necessary," if it believes a plan should be restored:

> In the case of a plan which has been terminated under Section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part of all of the remaining assets and liabilities of the plan.

The statute does not define what "action" is "necessary" to restore in the context of a court-approved termination. While section 4047 has not previously been construed by this Court, it does not exist in a vacuum. It has its place in a system where agencies may not overrule courts by fiat. It is part of a larger statutory scheme governing the distress termination of pension plans which contemplates both that a plan sponsor will have an opportunity to be heard and that there will be court involvement, except in certain situations in which the PBGC and the company whose plan is at issue can agree. *See* ERISA §§ 4041 and 4042, 29 U.S.C. §§ 1341 and 1342. To read section 4047 to allow the PBGC unilaterally to restore plans terminated with court approval

pursuant to the detailed criteria and procedures set forth in these related statutory provisions, potentially over the PBGC's objection, would make a farce of the overall legislative framework and lead to absurd results. The PBGC should be required to apply to the court that approved termination and show the factors underlying the termination have changed materially or there is otherwise a valid basis for restoration, not just that its reasons for wanting restoration are not arbitrary and capricious viewed from its own perspective.

A simple example proves the point. Suppose a company in Chapter 11 applies to the bankruptcy court, pursuant to ERISA section 4041(c)(2)(B)(ii), 29 U.S.C. § 1341(c)(2)(B)(ii) (West Supp. 1988), for approval of a distress termination of its pension plan. Suppose further the PBGC opposes the application because it believes (i) other plans adopted by the employer with bankruptcy court approval as part of an interim collective-bargaining agreement to avert a potentially disastrous strike are "abusive," and (ii) the employer's financial circumstances do not warrant a termination. Suppose further the PBGC's opposition to the termination is not "arbitrary and capricious" when viewed solely from the narrow perspective of the PBGC as the largest prospective creditor. But suppose the bankruptcy court nevertheless approves the termination in light of the Bankruptcy Code's overriding policies favoring reorganization, collective bargaining by companies in reorganization and nondiscrimination among unsecured creditors, and ERISA's goal of protecting the pensions of employees and retirees.

Could anyone reasonably argue under these circumstances that Congress intended to authorize the PBGC, without prior court approval, to thumb its nose at the bankruptcy court and unilaterally to restore the terminated plan effective as of the date of the court-ordered termination — in effect nullifying a court order made after a full adversary hearing?

The Decisions Below

The district court nevertheless found "[d]espite the symmetrical appeal of LTV's contention that Congress could not have intended to grant the PBGC unilateral veto power over court approved termination, established principles of statutory construction compel the conclusion that Congress did intend to grant the PBGC the power to restore terminated plans without first obtaining court approval," Pet. App. 88a, albeit not solely based on the PBGC's own parochial interests as a creditor and insurer. The court's rationale, affirmed by the court of appeals without further analysis, is not persuasive.

First, the district court erroneously relied on the principle that courts may not impose additional procedural requirements on an agency. Pet. App. 88a. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-25 (1978). That begs the very question at issue here: whether Title IV procedures for plan terminations *that Congress has imposed* and which make the courts rather than the PBGC the final arbiter of the appropriateness of termination in a bankruptcy reorganization, necessarily apply to the restoration process. If so, *Vermont Yankee* would not bar their enforcement.

Reaching next the question of what Congress actually legislated, the district court was led into error by the PBGC's argument that "the ordinary meaning of the language of section 4047 suggests that the PBGC needs no judicial authorization to restore a plan." Pet. App. 88a.[10] The statute only authorizes

[10] The PBGC now takes this hypertechnical construction one step further in its reading of the first sentence of section 4047, which provides that when the PBGC determines *prior to termination* that termination would be inappropriate, it "is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated." Calling restoration "simply the reversal of a termination," and construing that first sentence as literally as the PBGC demands the second sentence be read, the PBGC asserts the power to "stop a termination in progress 'whenever the corporation determines.' " Br. Pet. 33.

The PBGC's overreaching interpretation of what is "within its power" undermines its position. It would allow the agency unilaterally to render section 4041

(Footnote continued)

the PBGC "[i]n the case of a plan which has been terminated under section 4041 or 4042 . . . consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pre-termination status." It is a big and hardly "ordinary" leap from taking "necessary action" that must be "consistent with [the PBGC's duties] under this title" to acting unilaterally to reverse a court order entered pursuant to "this title." Had Congress intended to authorize the PBGC to restore on its own in such an extraordinary situation, it could and would have said so plainly, rather than limiting the PBGC to action that is "necessary," and "consistent with its duties under this title" which requires that courts be the final arbiters of plan terminations pursuant to sections 4041(c) and 4042(c).

The PBGC's argument that section 4047 gives it virtually unlimited discretion to restore pension plans terminated with court approval flies in the face of the well-settled rule that different portions of the same statute — here, provisions setting forth procedures and criteria for termination, and provisions governing restoration — are to be read consistently with each other, rather than so as to produce a hopeless conflict. *See Richards v. United States*, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its

a nullity "whenever [the PBGC] determines," by "stopping a termination in progress" even if it is *sub judice* before a court and the employer has satisfied all the statutory criteria for a voluntary termination. Moreover, it would be inconsistent with section 4042's provision that a trustee appointed during the period a possible termination is being considered may, if it disagrees with a PBGC decision not to seek termination, apply on its own for a court decree terminating the plan.

Actually, it is precisely because restoration is just "the reversal of a termination" — in the PBGC's words — that where Congress has mandated in section 4041 or 4042 that termination shall be by court order possibly entered over the PBGC's objection, it follows logically and as a matter of statutory construction of section 4047 that restoration must too.

object and policy' "); *United States v. Morton*, 467 U.S. 822, 828 (1984).[11] As the PBGC itself recognizes, "[r]estoration under section 4047 is simply the reversal of a termination." Br. Pet. 33. The termination of an underfunded plan of an employer undergoing reorganization involves a proceeding in which the PBGC is free to take such action as may be necessary to either support or contest the proposed termination, but in which the final decision to approve the termination is made by the court pursuant to the express provisions of ERISA sections 4041(c) and 4042(c). To construe section 4047 to allow a restoration in such a case without court approval would be inconsistent with these provisions governing plan termination criteria and procedures. Such a construction would produce a hopeless circularity in which, like a ping pong match, the PBGC could restore a plan that the court ordered terminated over PBGC objections, the court could then again order a termination on the basis of its prior finding that termination was necessary to effect the reorganization, the PBGC could restore for yet another time, and so on.

Moreover, ERISA section 4041(c)(2)(B)(ii)'s mandate that the distress termination of a single-employer pension plan of a company undergoing Chapter 11 reorganization can only be achieved with the express approval of the bankruptcy court reflects

[11] Furthermore, "it is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). "[A] statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

The PBGC's reading of section 4047 as a broad grant of authority is entitled to no deference. As this Court has stressed, "[t]he judiciary is the final authority on the issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984). An agency may not rely on its own interpretation to bootstrap its authority beyond its statutory mandate. *SEC v. Sloan*, 436 U.S. 103, 118-19 (1978). These principles have particular force here where the PBGC is far from a disinterested arbiter and has had little prior experience with the provision at issue.

Congress' obvious recognition that the "multiple, competing considerations of a Chapter 11 reorganization" may not be subordinated to one issue or policy. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984); *see United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). That only the bankruptcy court is situated to balance the interests of creditors, the employer and its employees, as well as societal interests in keeping a business operating, applies not just at the termination stage, but also at restoration.[12] Indeed, initial proposals for what became the Single Employer Pension Plan Amendments Act of 1986 ("SEPPAA") would have given the PBGC complete discretion to decide without need for court approval when a plan qualified for distress termination. *See* S. 1227, 98th Cong., 1st Sess. 11-14 (1983). This idea was rejected in favor of definite, objective criteria, including a court order in the case of a reorganization. There would have been little purpose in requiring such a court order and setting such criteria if the PBGC retained complete discretion to restore plans terminated by court order.[13]

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[12] Similarly, if the PBGC seeks to effect an involuntary plan termination, ERISA section 4042(c), 29 U.S.C. § 1342(c), expressly requires application "to the appropriate United States district court for a decree adjudicating that the plan must be terminated."

In contrast, termination without court order can only occur where a plan sponsor seeks to discontinue a plan and (1) the plan sponsor demonstrates that the plan can meet its benefit obligations, *see* 29 U.S.C. § 1341(b)(1)(D), so that a "standard termination" is effected, or (2) the plan sponsor group is undergoing liquidation in a bankruptcy proceeding, *see* 29 U.S.C. § 1341(c)(2)(B)(i), or (3) the PBGC determines that in the absence of termination an employer "will be unable to pay [its] debts when due and will be unable to continue in business" or that "the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce," *see* 29 U.S.C. § 1341(c)(2)(B)(iii).

[13] The legislative history of SEPPAA suggests Congress recognized the decision whether to restore a terminated plan should rest with the appropriate adjudicative entity, not with the PBGC:

> The Committee recognizes that the PBGC is not (and should not be) in a position to determine whether a proposed termination violates the contractual

(Footnote continued)

The district court placed weight on the provision in section 4047 for the PBGC to "transfer to the employer or a plan administrator . . . control of part of all of the remaining assets and liabilities of the plan," thereby supposedly implying that prior court approval would not be necessary. Pet. App. 88a. The district court read too much into the example. Authorizing the PBGC upon restoration to perform the physical act of transferring assets is not the same as authorizing the creditor to determine on its own when such restoration and transfer is warranted. Indeed, the Conference Report cited by the PBGC explains the corporation may, "when appropriate," make the transfer. Br. Pet. 22.

The district court also believed it significant that other ERISA provisions expressly refer to the need for court orders while section 4047 does not. Pet. App. 89a. But the prior court order requirement for restoration follows ineluctably from that of court approval for the underlying termination, which is clearly set forth in the immediately preceding sections 4041 and 4042 of the statute. The absence of repetition in section 4047, therefore, should hardly be determinative. To quote the PBGC again, restoration is "simply the reversal of a termination." Br. Pet. 33.

Finally, the district court found that allowing PBGC restoration, without prior court approval, of court-ordered plan terminations "is not inconsistent with Title IV's overriding purpose or its statutory scheme." Pet. App. 89a. The court reasoned

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> or statutory rights of any affected parties. Rather this determination must ultimately rest with the appropriate adjudicative entity, government agency, or court, as the case may be. Furthermore, the decision on what the appropriate remedy should be if the termination is found to have been improper (and specifically, *whether or not the plan should be restored*) also rests with the appropriate adjudicative entity, government agency or court.

H.R. Rep. No. 272, 99th Cong., 2d Sess. 293, *reprinted in* 1986 U.S. Code Cong. & Admin. News 922 (emphasis added).

The PBGC's reliance on the remarks of Senator Nickles (Br. Pet. 23) is misplaced. *See* Pet. App. 96a & n.27. They are the views of a single legislator, were not made at the time Section 4047 was passed, and do not constitute legislative history of any reliable kind. *See United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963).

such asymmetry was justified because Title IV was intended to protect private pension benefits, and while terminations can lead to immediate benefit reductions, "the immediate effect" of restoration "on participants, whose interests ERISA primarily protects, is either no change or an increase in benefit payments." Pet. App. 89a. That simplistic analysis is defective. As the Conference Committee report on ERISA recognized, employers, as well as participants, have "the right to a court decree of termination." H.R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5152. Indeed, section 4042(c), which authorizes the PBGC to apply to the district court for a notice of termination, requires only that notice of the proceeding be given to the plan administrator, which is the employer. The participants, whose interests the district court thought were intended to be paramount at termination, are not even entitled to prior notice. *See Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 201 (2d Cir. 1987).

Moreover, restoring a terminated plan to an employer unable to fund it can as surely lead to asset depletion and benefit reductions harmful to participants as can a termination. Thus, the criteria in ERISA section 4042(c) that allow the court to order a termination over the objection of the PBGC include a determination that "the plan must be *terminated* in order to protect the interests of the participants." Similarly, restoration may adversely affect the very jobs and livelihood of the participants if it leaves the employer unable to reorganize in Chapter 11 and forces it to liquidate instead. This case highlights the error underlying the district court's analysis: the USWA, which represents the workers who would supposedly benefit from restoration, in fact *opposes* it because the PBGC's unilateral order of restoration would abrogate those workers' interim labor agreement.

Nor is it enough for the district court to say that aggrieved parties, such as LTV, its creditors and the USWA, can bring an action against the PBGC under 29 U.S.C. § 1303(f). Pet. App. 89a-90a. That transfers the burden to the wrong parties.

Moreover, if the PBGC were allowed to act administratively, the standard of review would be different.[14]

In sum, reading section 4047 to permit the PBGC unilaterally to restore plans terminated by court order would lead to an absurd conflict of powers under ERISA: *termination* of a plan, when the sponsor is in Chapter 11 proceedings, would require permission of the bankruptcy court but not of the PBGC; yet *restoration* could follow immediately whenever the agency disagreed with a court-ordered termination. Nowhere in the PBGC's voluminous submissions to this Court and the courts below has it offered any example of a government agency empowered to undercut or reverse, through informal administrative adjudication, court decisions rendered after appropriate notice and hearing. Section 4047 should not be read to create such an anomaly.

II. ASSUMING THE PBGC HAD THE UNILATERAL POWER TO RESTORE, ITS ORDER WAS ARBITRARY AND CAPRICIOUS

Even assuming section 4047 granted the PBGC the power in an appropriate case unilaterally to restore a pension plan terminated by court order, the court of appeals and the district court correctly found the PBGC's restoration order here was arbitrary and capricious. The PBGC failed to consider all the relevant factors, placed great weight on matters which were not

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[14] It is of no moment that termination here was granted by consent upon the PBGC's application under section 4042. Quite to the contrary, Congress expressly granted the employer the rights to be heard and to have a court decide on the question of plan termination under section 4042, and could hardly have intended that those rights be circumvented by the PBGC upon restoration. Moreover, the PBGC has conceded that, but for the USWA's refusal to consent, LTV could have satisfied the distress termination requirements of section 4041. *See Promises at Risk: Report and Recommendations on Single-Employer Pension Plan Termination Insurance Premiums*, Pension Benefit Guaranty Corporation, p. 32 (April 7, 1987). Such a voluntary termination obviously would not have been subject to plenary veto by the PBGC. Accordingly, that this termination was ordered by consent under section 4042 should not foreclose LTV from having a court of appropriate jurisdiction, rather than the PBGC, determine in the first instance whether restoration is warranted.

relevant and did not militate in favor of restoration, and misinterpreted the evidence bearing on the only arguably relevant factor it considered.

A. *The PBGC's purported justifications for restoration are subject to a full and searching judicial review*

The PBGC is an administrative agency subject to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* Under the APA, PBGC decisions must be vacated if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).[15] Review of the PBGC's decision must be based on the record the agency presented to the district court. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).[16]

Judicial review of agency action under the "arbitrary and capricious" standard requires a "searching and careful" inquiry into the facts to determine whether the administrative action was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Exacting judicial review is necessary to safeguard against actions in which

[15] The Bank Group does not concede the arbitrary and capricious standard is applicable. Plenary *de novo* review is required by the Bankruptcy Code, *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), and by the APA because the PBGC's decision was "adjudicatory in nature and the [PBGC's] factfinding procedures [were] inadequate." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The court of appeals voided the PBGC's restoration attempt even under the arbitrary and capricious standard.

[16] Several *amici* have now submitted data purporting to reflect the state of the steel industry and other matters during the period following the PBGC's restoration order. *See* Brief Amicus Curiae of Retired Employees Benefit Coalition, Inc.; Brief Amicus Curiae of Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation, and USX Corporation; Brief for the United States as Amicus Curiae. This purported data is inadmissible and irrelevant in evaluating the PBGC's order. A court may not defer to *post hoc* rationalizations for an agency's actions. *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 143 (1984).

"the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision which runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." ***Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.***, 463 U.S. 29, 43 (1983). An agency may not engage in an "ad hoc determination geared towards reaching a given result in spite of the absence of support." ***PBGC v. Potash***, No. CIV-79-130B(E) (W.D.N.Y. 1986) (available on Westlaw, DCT Library).

Particularly where, as here, the administrative agency is not disinterested, but has substantial pecuniary interests that may affect the exercise of its discretion, an especially careful evaluation of its decision is called for. As demonstrated above, the PBGC does not come before this Court as an impartial administrative agency. It is LTV's largest creditor. The record reflects the PBGC was motivated in large part by its own economic interests in attempting to restore the Plans.

B. *The PBGC's attempted restoration was arbitrary and capricious and correctly vacated by the courts below*

The PBGC now cites two justifications for its restoration of the Plans: it believed that (i) the bankruptcy court-approved 1987 CBA plans were "abusive"; and (ii) there was a material improvement in LTV's financial circumstances. As the courts below found, the PBGC's decision was arbitrary and capricious.

The PBGC failed to consider numerous highly material factors militating against restoration. Moreover, the principal factor upon which the PBGC relied does not warrant restoration: LTV's court-approved 1987 CBA plans are not "abusive follow-on plans" and, regardless, are not relevant to restoration. The second, and only arguably appropriate factor purportedly considered by the PBGC was whether LTV Steel could afford the Plans. LTV could not, as the PBGC would have had to conclude had it applied any appropriate measure of financial health. Many were handy in the PBGC's own minutes of its termination

decision seven months earlier, and in its own regulations. Instead, the PBGC ignored all its standards, pulling an ad hoc, self-serving inference from scanty, artificial, and hastily-assembled data.

1. *The PBGC arbitrarily and capriciously failed to consider numerous highly material factors in deciding upon restoration*

The PBGC restoration decision was not "based on a consideration of the relevant factors," *Overton Park*, 401 U.S. at 416 — as the PBGC has conceded is required, JA 229[17] — because it left out numerous highly material considerations which preclude restoration.

First and most important, the PBGC had a duty to consider competing statutory policies, *see, e.g.*, *Burlington Truck Lines v. United States*, 371 U.S. 156, 172-74 (1962), but did not do so. As the court of appeals observed, "[b]ecause ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and to the extent possible, honored the policies underlying them." Pet. App. 14a-15a.

The PBGC erroneously contends the labor and bankruptcy law principles cited by the lower courts are mere "inchoate policies" it is free to disregard. Br. Pet. 39. However, as the PBGC admits (Br. Pet. 43), "Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws" by providing that "an employer in bankruptcy reorganization may be able to terminate an underfunded pension plan if it can demonstrate

[17] PBGC Executive Director Utgoff, in an affidavit submitted to the bankruptcy court, asserted that in determining whether subsequent plans are abusive "the PBGC views all arrangements together, regardless of their stated purposes, and taking into account all relevant facts and circumstances." JA 229. The PBGC's brief now claims, though, that the agency was not obliged to consider facts and circumstances relating to the labor and bankruptcy laws. Br. Pet. 39-43. The PBGC's litigation posture thus contradicts the affidavit of its own Executive Director.

to the bankruptcy court that it will not otherwise be able to reorganize. *See* 29 U.S.C. § 1341(c)(2)(B)(ii)." Since the PBGC also concedes restoration "is simply the reversal of a termination" (Br. Pet. 33), logic dictates the PBGC cannot restore plans based on the interim 1987 CBA plans, which the bankruptcy court found were "clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor," JA 260, where Congress has by statute chosen through plan terminations to promote reorganization over the continuation of underfunded plans. At the very least, the PBGC should have considered this.

Indeed, the PBGC's current argument that these other laws are not "directly related" to restoration is not only obviously incorrect, but also inconsistent with its prior positions. In deciding on termination of the Plans in December 1986, for example, the PBGC itself recognized its obligation to consider whether LTV could afford "to finance a plan of reorganization and the ongoing Plans." JA 129. Similarly, in opposing the USWA's bankruptcy court suit for injunctive relief to compel LTV to pay the non-guaranteed pension benefits not being paid by the PBGC, the agency argued that requiring "the Debtor to continue to pay the pre-petition [pension] claims of retirees outside of a Chapter 11 plan of reorganization would pervert . . . the collection scheme for pre-petition debt embodied in the Bankruptcy Code." Pet. App. 43a. The central tenet of that Code, undermined by the PBGC's restoration decision, is equality of treatment among similarly situated creditors.

The PBGC also failed to consider whether restoration was an appropriate means and whether there were less intrusive and disruptive alternative means to deal with what it thought to be abusive 1987 CBA plans. For example, it could have pursued its appeal from the bankruptcy court's order approving the 1987 CBA which incorporated those plans. If the appeal were successful, there would either have been no CBA plans or CBA plans acceptable to the PBGC, but not restoration.

In addition, the PBGC ignored ERISA's overriding policy favoring the fullest possible pension plan coverage of employees and retirees. As Congressman Walgren stated, the PBGC's

conduct "leave[s] it unclear whether they are serving the interests of those retirees that the PBGC was set up to serve or whether the PBGC has been driven by its motivation for self-preservation." 133 Cong. Rec. E3675 (daily ed. Sept. 23, 1987).

Finally, the PBGC did not consider whether it, as an interested party, was not an appropriate adjudicator of the question of restoration. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). It can hardly be disputed that the PBGC, while acting as adjudicator, had an important self-interest in restoration because of its position as the largest creditor of LTV and because the impending passage of the PPA would potentially improve its position by at least $800 million in any subsequent Plan termination. *See* page 11 & n.7 above. Indeed, the PBGC's own internal memorandum explaining its decision to attempt restoration of the Plans admits the agency "decided not to recommend restoration of the Republic salaried plan." The only rationale given there was that "facts currently available indicate that PBGC will recover 100 percent of the plan asset insufficiency for that plan." JA 321, 329. Of course, the PBGC's purported reasons for restoring the other terminated Plans — the "abusive" character of the CBA benefit package, and LTV's improved financial condition and "willingness" to fund employee benefits — apply with equal force to the Republic Salaried Plan. The key difference — which was sufficient for the PBGC to decide not to restore that plan — was the PBGC's ability later to recoup all paid guaranteed benefits.

The failure even to consider all of these relevant factors was obviously "arbitrary and capricious." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Standing alone, it requires reversal of the PBGC's "restoration."

2. *LTV's 1987 CBA plans were consistent with rather than an abuse of ERISA; it was arbitrary and capricious for the PBGC to ground restoration in part on the CBA plans*

The first and only real rationale advanced by the PBGC for its restoration decision was that ERISA was "abused" by the 1987

CBA plans, even though LTV agreed to them in an effort to secure labor peace and obtain concessions on the issues of job consolidation, manning requirements and reductions in LTV's cost of health and life insurance for active and retired employees. It was arbitrary and capricious for the PBGC so to conclude, for several different reasons.[18]

As a threshold matter, the PBGC did not act pursuant to any ascertainable written standards, certainly none promulgated before the 1987 CBA plans were negotiated. Rather, as revealed in the minutes of the very first PBGC staff meeting to consider restoration, JA 314, the agency's finding of abuse was based entirely on the affidavits of PBGC officials which had just been considered and rejected by the bankruptcy court, and by every other court which had denied the PBGC's repeated requests to stay implementation of the plans.[19] The PBGC should be collaterally estopped from relitigating this issue or relying on it administratively. *See, e.g., Montana v. United States*, 440 U.S. 147, 155 (1979). Indeed, it also conflicts with the PBGC's own prior legal position in *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982), where the PBGC

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[18] As noted above, an early draft of the Executive Summary upon which the PBGC Executive Director based her restoration decision states the Working Group "would have recommended restoration in response to LTV's abuse of the pension insurance system, whether or not the company's financial circumstances had changed." JA 351. The final version of this Summary admits LTV's alleged financial improvement was "not the primary basis" for the recommendation to restore. JA 354.

[19] Similarly, the definition of abusive plans contained in the PBGC's brief, Br. Pet. 7, is taken solely from those affidavits, which themselves cite no authority. The only previous PBGC pronouncements on what it considered "abusive" — its three prior opinion letters — did not provide any basis for application to the 1987 CBA plans. As the court of appeals found, these letters addressed circumstances that are factually distinguishable: they involved voluntary rather than involuntary terminations, and did not address the labor and bankruptcy law concerns which must be considered in determining whether LTV's 1987 CBA plans are abusive. Pet. App. 20a. Thus, what the PBGC describes as its "longstanding policy against abusive follow-on plans," Br. Pet. 11, in fact offered LTV Steel and the USWA no guidance at all.

filed a brief supporting the right of retirees to sue the sponsor of a terminated plan to recover lost, nonguaranteed benefits, arguing nothing in ERISA bars a claim for the payment of nonguaranteed benefits. *See* Pet. App. 106a. This position prevailed; as the court of appeals found, "ERISA contains no restriction on employees' rights to receive benefits not guaranteed under ERISA." Pet. App. 19a. At the very least, the PBGC's failure to set clear standards, and to consider *Murphy v. Heppenstall* and the factors relied on by the bankruptcy court in approving the 1987 CBA plans, was arbitrary and capricious.

Beyond that, Title IV of ERISA establishes Congress did not intend the promulgation of successive benefit plans to be a ground for restoration. ERISA sections 4041 and 4042 contain detailed and exclusive standards for distress and other terminations. Nowhere are new benefit plans mentioned. Since "[r]estoration under section 4047 is simply the reversal of a termination," as the PBGC itself recognizes, Br. Pet. 33, it is those section 4041 and 4042 termination criteria, and only those criteria, that are to be weighed in determining the propriety of restoration.

As discussed in detail in the lower court opinions, the legislative history also shows the CBA plans are not material to the question of restoration. Pet. App. 17a-18a, 93a-100a. Confronted by the PBGC with the same specter of dozens of unscrupulous companies trying to unload their unfunded pension liabilities on the agency as the PBGC raises here, together with its proposed statutory limitation on "follow-on" plans (*see* page 11 above), Congress chose to adopt a different solution to the risk of abusive termination.[20] Instead of granting the

[20] The PBGC attempts to blunt the impact of this Congressional rejection of its position by arguing the rejected proposal would have barred *all* follow-on plans, whereas the PBGC now challenges only "abusive" follow-on plans. Br. Pet. 24-25. This purported distinction merely highlights the PBGC's failure to explain which post-termination plans it considers "abusive," and why.

The PBGC's parade of horribles is in all events irrelevant for the simple reason that *it* was the PBGC, not LTV, which sought court termination of the Plans here. The PBGC is fully capable of limiting itself to cases where terminations are truly required. And nothing that happens here will compel the PBGC to seek any other terminations.

PBGC standardless discretion to reverse a termination if subsequent plans make up in whole or in part any of the benefits lost by the termination, Congress enacted stringent criteria to limit terminations, imposed increased termination liability on plan sponsors, and created mechanisms for the replacement of lost benefits that were not guaranteed. Under these new statutory provisions, the PBGC's fear that it will be bankrupted by hundreds of companies seeking to duplicate LTV's "abuse" is wholly unfounded. No company can force the PBGC to assume its unfunded pension liabilities through voluntary termination unless it (a) files for reorganization, with all the attendant business disruption and negative publicity, and (b) persuades a bankruptcy judge that plan termination is necessary for the business to continue.[21] Moreover, assuming a company has terminated its plan, the PBGC still has a claim against the sponsor for the full amount of unpaid benefits. Granting the PBGC the additional authority to restore any plan where it deems there is "abuse" would create no additional deterrent, but — as LTV's experience demonstrates — would encourage the PBGC to elevate its own parochial interest above all competing statutes and policies.[22]

[21] As noted at pages 21-22 n.10 above, the PBGC claims it can stop a termination proceeding dead in its tracks if it so chooses. Br. Pet. 33.

[22] Until 1986, an employer had discretion to terminate a plan whenever it wished, regardless of whether the plan had assets sufficient to pay all PBGC-guaranteed benefits or whether the employer could afford to continue the plan. H.R. Rep. No. 241, part 2, 99th Cong., 2d Sess. at 32, 41, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 699. The PBGC's claim against the employer for unfunded guaranteed benefits was capped at 30% of the employer's net worth.

The 1986 SEPPAA amendments prohibited employers from terminating unless the plan contained sufficient assets to pay both guaranteed and vested benefits (a so-called "standard termination"), 29 U.S.C. §§ 1301(a)(16), 1341(b) (Supp. IV 1986), or the employer met the more stringent criteria for a "distress termination," generally including court approval. 29 U.S.C. § 1341(c) (Supp. IV 1986). The PBGC's claim against the employer for unfunded benefits was expanded to the greater of 30% of the company's net worth or 75% of the unfunded guaranteed benefits. 29 U.S.C. § 1362(b)(1)(A) (repealed 1987).

(Footnote continued)

Strong ERISA policies also favor the 1987 CBA plans, in addition to the bankruptcy and labor law provisions discussed at pages 30-31, above. ERISA section 2(a), 29 U.S.C. § 1001(a), contains Congress's finding that employee benefit plans are "an important factor affecting the stability of employment and the successful development of industrial relations." ERISA section 2(b), 29 U.S.C. § 1001(b), provides it is the "policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries." Moreover, in 1986 (in SEPPAA), and again in 1987 (in PPA), Congress expressly provided a mechanism for the payment of non-PBGC guaranteed benefits in a distress termination under section 4041 or an involuntary termination by the PBGC under section 4042. *See* ERISA sections 4049 and 4062(c), 29 U.S.C. §§ 1349 and 1362(c) (1986) (added by SEPPAA) and sections 4062(c) and 4062(b)(1)(A), 29 U.S.C. §§ 1322(c) and 1362(b)(1)(A)(1987) (added by PPA). In this context, it is hardly surprising the PBGC has mustered no authority at all for its position that an employer otherwise unable to make all required plan contributions may not contribute to its employees a portion of the difference between what they may have been entitled to under a terminated plan and the PBGC guaranty, particularly when such an agreement will promote industrial peace and reorganization.

Nor would the 1987 CBA plans increase the PBGC's financial exposure. While the terminated Plans were defined benefit plans qualified under section 401(a) of the Internal Revenue

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In 1987, Congress imposed still further restrictions on the ability of plan sponsors to terminate plans with unfunded benefits. Under the 1987 PPA, to invoke distress termination without PBGC approval, an employer must either be subject to bankruptcy liquidation proceedings, or be in reorganization proceedings, and the bankruptcy court must approve the termination after determining the termination is necessary for the employer to continue in business and to effect the reorganization. 29 U.S.C. § 1341(c)(2)(B) (West Supp. 1988). The PBGC's claim against the sponsor rose to 100% of unfunded benefits, whether or not vested or guaranteed, 29 U.S.C. § 1362(b)(1)(A) (Supp. 1987). To head off funding troubles before they threatened to require termination, the PPA also increased the minimum funding requirements for underfunded plans. 26 U.S.C. § 412(*l*); ERISA § 302(d), 29 U.S.C. § 1082(d).

Code, 26 U.S.C. § 401(a), and covered by the PBGC insurance program for most of the benefits provided, none of the 1987 CBA plans are covered by PBGC insurance. Rather, they are either qualified defined contribution plans, or welfare or other pension benefit plans of a type outside the PBGC insurance system. The plain implication of SEPPAA is if all requirements for a termination have been met, as the PBGC and the court found they had been at the time of termination in January 1987, the maintenance of a defined contribution plan thereafter would in no way be inconsistent with the termination. Thus, when SEPPAA imposed specific limitations on the right to terminate a qualified defined benefit plan, ERISA section 4041(e) was altered to provide the amendment of a defined benefit plan into a defined contribution plan constitutes a termination of the defined benefit plan and, as such, can be effective only upon satisfaction of the requirements for termination of the defined benefit plan. *A fortiori*, the maintenance of any other type of new plan that is not a qualified defined benefit plan would not vitiate the termination, since the prerequisites for termination in such a case equally would be met.

Finally, the PBGC's administrative record does not in any event support its conclusion that the 1987 CBA plans are in any way abusive. The only analysis proffered by the PBGC to show the 1987 CBA plans were mere continuations of the terminated Plans is four conclusory paragraphs in an affidavit submitted to the bankruptcy court during the PBGC's unsuccessful attempt to block approval of the 1987 CBA plans. *See* JA 234-35. While this analysis lists several similarities between the Plans, it takes no notice whatever of the many substantial differences, including (1) substitution of a defined contribution plan for the much safer, PBGC-insured defined benefit plan; (2) substantial health insurance copayments for all workers and retirees; (3) the loss of tax-preferred status; and (4) certain more restrictive eligibility requirements. The PBGC's utter failure even to note these differences cannot be justified by the agency's rote invocation of its "discretionary authority."

3. *It was arbitrary and capricious for the PBGC to base restoration in part on its finding that LTV could afford the terminated Plans*

The PBGC's second purported basis for restoration was that LTV could afford the terminated Plans. That finding was also arbitrary and capricious, for several reasons.

At the threshold, the statement in one of the PBGC's internal memoranda that restoration would be recommended "whether or not the company's financial circumstances had changed," JA 351, raises grave questions whether the PBGC truly grounded its restoration decision on any improved financial situation or whether that was an afterthought, contrived because the PBGC recognized the alleged abusiveness of the 1987 CBA plans alone could hardly justify restoration.

The PBGC did not in any event act pursuant to any ascertainable standard, and arbitrarily ignored the many standards it has promulgated to evaluate the financial well-being of an employer. Contrary to the PBGC's current representation, Br. Pet. 34, the creditor did not even "look[] at the same factors" it had considered at termination. *Compare* pages 4-6 and 11-14 above. Moreover, although the PBGC had proposed detailed regulations for determining whether an employer's financial distress justified termination of its plans, *see* 52 FR 33318 (1987) (to be codified at 29 C.F.R. § 2616.14), the agency never looked to these regulations in concluding LTV's finances had improved. Indeed, while these plan termination regulations require review of projected revenues and expenses (including minimum funding contributions) for each of the next three years, the PBGC acknowledged at restoration it was "not attempting to project economic or other factors that will affect LTV in the future," JA 343, and focused on financial data for only the five months from January through May, 1987.[23]

[23] The PBGC also declined to evaluate LTV Steel's financial health under the criteria it considers in permitting an employer to defer payment of its liability to the PBGC. These factors would include (1) the ratio of LTV Steel's liability

(Footnote continued)

Nor did the PBGC even "attempt[] to project economic or other factors that will affect LTV in the future," JA 343, or to "predict LTV Steel's long-term cash flow," JA 318, much less to consider the risk the Plans would have to be reterminated. On the contrary, the agency steadfastly insisted that when deciding whether to restore, it was not obliged to analyze whether LTV would be able to fund the Plans beyond the immediate short term. Br. Pet. 34-37. However, as the court of appeals held:

> ERISA is concerned with the promulgation and maintenance of plans that are viable in the long term as opposed to those which are uncertain or "pay-as-you-go." *See* 29 U.S.C. § 1002(31). Likewise, section 1.401-1(b)(2) of the IRS Regulations, 26 C.F.R. § 1.401-1(b)(2) (1988), which pertains to deferred compensation and compliance with which is required for PBGC insurance, *see* 29 U.S.C. § 1321(a), states that "[t]he term 'plan' implies a permanent as distinguished from a temporary program." Here, if the restored plans were viable only for a short period of time, they might in the near future once again have to be re-terminated, thereby defeating the purposes and objectives of ERISA and the tax laws.

Pet. App. 24a-25a. The court added, "the resulting vacillation in agency policy would lead to uncertainties on the part of the retirees, plan sponsors, creditors and the government. Such uncertainty is to be avoided where possible." Pet. App. 25a.

to its net worth; (2) the amount and terms of its existing debts; (3) the amount and availability of its liquid assets; (4) LTV Steel's current and past cash flow; (5) LTV Steel's projected cash flow and the impact payment of PBGC liability would have on this cash flow; and (6) the availability of credit from private sector sources. 29 C.F.R. § 2622.8. All of these factors demonstrated LTV Steel could not afford to fund the restored Plans.

The PBGC further failed to follow its standards for evaluating an employer's net worth. In calculating an employer's liability to the PBGC for the agency's payment of guaranteed benefits, the PBGC evaluates an employer's fair market value, including many defined elements of its present financial condition. 29 C.F.R. § 2622.4. Any one of those factors would have showed LTV could not afford its minimum funding obligations or other pension liabilities.

The PBGC responds by disclaiming the ability to predict the long term viability of pension plans. Br. Pet. 36. That claim is disingenuous. 29 U.S.C. § 1342(a)(4) specifically authorizes the PBGC to order termination where "the possible *long-run* loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated," and the PBGC's own earlier analysis at the time of the Plans' termination looked to the long term and concluded that involuntary termination was necessary "to avoid unreasonable deterioration of the financial condition of the plans." JA 140; *see* pages 4-6 above.

Finally, the PBGC's skimpy four-page financial analysis (JA 343-46) does not support its conclusion that LTV's finances had improved sufficiently for it to resume funding the terminated Plans. In reaching that determination, the PBGC estimated the cost of funding the Plans in 1988 would be $260 million, assuming LTV would be able to obtain minimum funding waivers from the IRS for the prior plan years and the USWA would allow the $50 million in concessions negotiated under the 1987 CBA. The PBGC then reasoned that since LTV's current two-year business plan forecast 1987 operating income of $238.5 million, and actual results for the first five months of 1987 were ahead of that pace, "it appears that the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation." Pet. App. 22a; JA 345.

However, as noted by the court of appeals, the finding of affordability is based on the two fundamental, yet unexplained and unexamined assumptions without support in the record relating to IRS waivers and USWA concessions. Pet. App. 21a-23a. Since the IRS had already denied LTV a waiver for 1986 and revoked its waiver for 1985 there is no basis for the PBGC's conjecture.[24] Similarly, the administrative record

[24] The PBGC argues that because under 26 U.S.C. § 412(f)(3)(A), the IRS is obliged to consult with it before granting large funding waivers, the PBGC

(Footnote continued)

nowhere explains why the USWA would accept the $50 million in concessions if its lost pension benefits were restored through other means.

As for LTV's five-month improvement in financial performance, the PBGC simply ignored that much of it resulted from a short-term factor — a lengthy strike at USX, one of LTV Steel's largest competitors — which rendered the five month results inadequate to project LTV Steel's future cash flow. *See* Pet. App. 113a. The PBGC's conclusion also disregarded the effect of LTV's Chapter 11 status on its balance sheet. For example, while the decision to restore was based in part on LTV's cash on hand (JA 345-46), the PBGC had forecast this cash buildup at the time it ordered termination (JA 129). The increased cash followed naturally from the stay on LTV's debt payments, and did not imply a real improvement in LTV's finances. *See* Pet. App. 23a, 112a-113a. Nor would LTV Steel's performance in Chapter 11 indicate how it would fare after reorganization: while LTV derives short-term benefit from its ability under Chapter 11 to reject burdensome long-term contracts, this may give rise to damage claims which must be satisfied as part of its reorganization. *See* 11 U.S.C. § 365.

The PBGC's "financial analysis" also did not analyze to what extent LTV would have been permitted under the Bankruptcy Code to make contributions to the Plans, absent court order, even if the cash was available to do so. The PBGC cannot contest that when the Plans were terminated, just eight months before restoration, the agency accepted LTV's conclusion that because it "is currently in reorganization under Chapter 11 of the Bankruptcy Code, LTV cannot and will not make contributions to the Plans to eliminate the accumulated funding deficiencies arising upon the denial of the funding waivers identified above." JA 126; *see also* JA 128. However, the PBGC now

has acquired expertise in determining when such waivers would be granted. Br. Pet. 36 & n.22. This argument ignores that under section 412(f)(3)(A) the IRS need not consult with the PBGC before *denying* a waiver, and that the IRS had *already* denied a waiver for the 1984 and 1985 Plan years, only a few months before the PBGC terminated the Plans.

takes issue with the court of appeals' holding that pension contributions, to the extent they are made to pay for benefits accrued in consideration for services rendered prior to LTV's bankruptcy filing, are pre-petition debts entitled to no special priority and not immediately payable. Pet. App. 23a-24a. The PBGC's challenge (Br. Pet. 37-38; *see also* Brief for the United States as *amicus curiae* 22-23 n.18) has no merit.[33]

While the scope of the PBGC's objection to the ruling of the court of appeals is not clear, there can be no question that LTV Steel's minimum funding requirements for the 1984 and 1985 Plan years — which were more than 6 months prior to its July 17, 1986 Chapter 11 filing — are pre-petition obligations on account of pre-petition services. Those contribution obligations, which the PBGC assumed would be waived in restoring the Plans, amounted to more than $350 million. Pet. App. 38a; JA 122, 233.

LTV Steel's minimum funding requirements for subsequent plan years upon restoration would include both past service obligations for pre-petition work, and future service obligations for post-petition work. *See* 29 U.S.C. § 1082(b)(2). The LTV Bank Group does not dispute that contributions for services rendered post-petition may be entitled to an administrative priority (and those for services during the 180 day pre-filing period to a lesser priority). *See* 11 U.S.C. §§ 507(a)(1) and 507(a)(4). The court of appeals did not hold to the contrary nor suggest in any way that LTV Steel could not, for example, continue to make payments under the 1987 CBA plans. On the other hand, post-Chapter 11 contributions on account of services actually rendered more than 180 days before LTV's Chapter 11 filing have no priority and may only be made pursuant to a plan of reorganization which fairly distributes LTV's assets among all pre-petition creditors.

[33] The PBGC mistakenly argues that denying its claims priority status will make termination less expensive, thereby increasing the incentive to terminate. Br. Pet. 38-39. Although the PBGC's recovery is reduced if its claims are denied priority, the debtor's incentive to terminate does not increase, since the debtor's assets already belong to its creditors.

The PBGC's claim to the contrary is premised on section 503(b)(1)(a) of the Bankruptcy Code, which allows a first priority for "administrative expenses," including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." The administrative expense priority does not, however, cover contributions on account of services rendered prior to a Chapter 11 filing. It is settled that because bankruptcy law presumes that the debtor's limited resources will be equally distributed among his creditors, statutory priorities are narrowly construed. *Joint Industry Board v. United States*, 391 U.S. 224, 228 (1968). "[I]f one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952). The purpose of the administrative expense priority is to encourage persons to "do business with the debtor in possession" and thereby promote "rehabilitation of the business" by giving "the debts incurred by the debtor in possession . . . priority over the debts which forced the estate into bankruptcy in the first place." *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986). "Accordingly, an expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession . . . and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor in possession in the operation of the business. A debt is not entitled to priority simply because the right to payment arises after the debtor in possession has begun managing the estate." *Id. McFarlin's* is a case in point. There, the Second Circuit held withdrawal liability owed to a multiemployer pension plan is not entitled to an administrative priority because it "is made to guarantee pension benefits already earned [pre-petition] by those employees covered by the plan." *Id.*; *accord*, *Amalgamated Ins. Fund v. Kessler*, 55 B.R. 735 (S.D.N.Y. 1985); *In re Great N.E. Lumber & Millwork Corp.*, 64 B.R. 426 (Bankr. E.D. Pa. 1986); *In re Silver Wheel Freightlines*, 57 B.R. 476 (Bankr. D. Or. 1985).[34]

[34] Assuredly, the district court in *Columbia Packing Co. v. PBGC*, 81 B.R. 205, 208 (D. Mass. 1988), did rule that statutory funding obligations

(Footnote continued)

As the court of appeals held in this case, Pet. App. 23a, *McFarlin's* analysis would apply equally to any contribution obligations LTV Steel might otherwise have to the Plans upon restoration. Thus, for example, to the extent LTV Steel's contribution obligations to the Plans upon restoration were to pay for pensions to retirees, they would not be entitled to administrative priority because they would be for services rendered long before the Chapter 11 filings. The PBGC has itself argued, in opposing the USWA's bankruptcy court suit for injunctive relief to compel LTV to pay the non-guaranteed pension benefits not being paid by the PBGC, that requiring "the Debtor to continue to pay the pre-petition claims of retirees outside of a Chapter 11 plan of reorganization" would be inconsistent with ERISA and "would pervert . . . the collection scheme for pre-petition debt embodied in the Bankruptcy Code." Pet. App. 43a.

In sum, the PBGC's slipshod financial analysis, like its defective "abuse" arguments, provided no grounds for restoration. The PBGC's decision to go ahead nevertheless was arbitrary and capricious.

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attributable to the post-petition period represented an expense entitled to administrative priority even to the extent made to fund benefits for service before the petition was filed. We respectfully submit that decision was in error. Such obligations are not an actual and necessary cost or expense of preserving the estate. The consideration for which they arise was not supplied to the estate during the priority period. And the fact that the obligation did not accrue until after the priority period began – which *Columbia Packing* found so important, 81 B.R. at 208-09 – is irrelevant to the analysis. *See McFarlin's, Inc., supra*. That *Columbia Packing* concept would cause every loan or other obligation incurred pre-petition but payable post-petition to become an administrative claim. This would radically change bankruptcy law in a destructive manner since it would cast substantial amounts of unsecured claims into the first administrative status, leaving little, if anything, for other unsecured claims.

In re Robinson Truck Line, Inc., 47 B.R. 631 (Bankr. D. Miss. 1985), also relied upon by the PBGC, is inapposite because it considered the debtor's liability for unfunded pension contributions in the context of a plan of reorganization, not, as here, as a basis for creating a nonstatutory priority claim before a plan of reorganization has even been proposed.

III. DEFICIENCIES IN THE PBGC'S PROCEDURES RENDERED ITS RESTORATION DECISION ARBITRARY AND CAPRICIOUS

Even though ERISA section 4047 does not prescribe specific procedures to be followed by the PBGC in deciding whether to restore, the PBGC does not enjoy unbridled procedural discretion to act as it wishes. As this Court has declared, "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 288 n.4 (1974). This opportunity for response must come "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The PBGC's procedures here fell far short. In the words of the court of appeals,

> PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards by which to evaluate when a plan sponsor's financial condition has so improved as to warrant restoration, nor provided a statement showing its reasoning in applying these standards. Failure to do any of these things renders the decision arbitrary and capricious.

Pet. App. 26a.

A review of the administrative record compiled by the PBGC reveals the many serious flaws. For example, the PBGC's Notice of Restoration informed LTV the plans were being restored because LTV had adopted "abusive" follow-on plans and because LTV's finances had improved. However, before issuing the Restoration Notice, the PBGC never told LTV what standards it would use to determine whether the 1987 CBA plans were abusive. There was no notice at all of the PBGC's alternative ground for restoration. After months of discussion with LTV

in which the only issue treated as relevant was whether the 1987 CBA plans were abusive, the PBGC suddenly claimed LTV's improved finances justified restoration without affording LTV any opportunity to present evidence on the issue.[27]

The absence of any explanation of the PBGC's reasoning is also striking. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). Although the "administrative record" pieced together by the PBGC after the restoration decision was made includes voluminous raw data in the form of detailed descriptions of the terminated Plans, the 1987 CBA plan package, and various governmental filings by LTV, there is little in the way of analysis.[28] The PBGC failed to present any legal support for its asserted power to overrule the bankruptcy court's findings through unilateral administrative action, nor to explain what, if any, factors justified its decision to exercise this purported power. Nor did the PBGC explain why it ignored LTV's long-term financial stability in concluding LTV could fund the restored Plans. Most importantly, the PBGC did not, and does not to this day, offer any grounds other than alleged "administrative discretion" for its complete subordination of labor

[27] The court of appeals correctly held that the open-ended invitation by the PBGC for LTV to submit "any additional information you might wish to supply," JA 348, failed to notify LTV the PBGC was looking at LTV's finances as a possible basis for restoration. Pet. App. 26a. *See also* page 13 above. The PBGC's defense that it relied entirely on information provided by LTV (Br. Pet. 48) misses the point: LTV had no way of knowing for what purpose the information was being used, nor what standards were being applied. It had no chance to supply more. The PBGC cannot assert the "discretion" to restore LTV Steel's Plans without conforming to basic standards of fairness necessary to ensure the proper exercise of that discretion.

[28] The size of the administrative record is deceiving. The record contains little of substance. Most of the 1,592 pages are merely copies of LTV's public filings. The PBGC spent fewer than ten pages explaining its actions, and fewer than forty pages contain any regulatory consideration at all. AR 1-14a, 637-45, 1154-55, 1577-84. The record is also one-sided. For example, the PBGC included the direct testimony of its witnesses opposing approval of the 1987 CBA (JA 226-37; AR 197-218), but not the direct testimony of LTV Steel's witnesses supporting approval, even though both views were presented at the same hearing.

and bankruptcy policies to its overriding goals of punishing LTV Steel and enhancing its own position at the expense of LTV's other creditors.

Worse still, the administrative record is incomplete and does not include important information necessary to explain the PBGC's decision. For example, there are just two pages of a draft of an Executive Summary dated September 18, 1987, which the PBGC now claims (without record support) was "inadvertently" included in the record. JA 350-51. This draft suggests the PBGC's decision to restore was in fact based entirely on its desire to punish LTV Steel for its alleged "abuse" of the pension system. But it has been rewritten in the final version, without explanation. JA 354. As the district court observed, these changes "partially belie[] the PBGC's contention that an alleged improvement in LTV Steel's financial improvement was an important factor in the restoration." Pet. App. 110a-111a n.36.

Moreover, the draft Executive Summary contains part of a list of enclosures which includes two important items not found on the corresponding list in the final version, nor elsewhere in the record. One, item 13, is the "Minutes of the Board of Directors meeting held on September 17, 1987." The other, item 12, is "Data sheets setting forth an analysis of plan asset solvency under different scenarios following restoration of the LTV Steel pension plans." LTV and reviewing courts are certainly entitled to know what those analyses involve and whether they do not show the PBGC's conscious consideration of the possibility of restoration and then retermination under the more favorable *to the PBGC* provisions of the PPA, which was expected to be enacted shortly.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be modified and the cause remanded with instructions to vacate the PBGC's Notice of Restoration.

Dated: January 16, 1990

Respectfully submitted,

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PENSION BENEFIT GUARANTY CORPORATION,

Petitioner,

v.

LTV STEEL COMPANY, INC., OFFICIAL
CREDITORS OF LTV CORPORA-
OF PARENT CREDITORS OF THE
OF UNSECURED CREDITORS OF LTV
OFFICIAL COMMITTEE
MCORPTEXAS DALLAS, N.A.
NATIONAL BANK, CITI-
MILLER, AND WILLIAM W. SHAFFER,

Respondents.

TO THE UNITED STATES
FOR THE SECOND CIRCUIT

THE LTV CORPORATION
LTV STEEL COMPANY, INC.

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QUESTION PRESENTED

May a reviewing Court vacate and remand the PBGC's Notice of Restoration, based, in the agency's words, "on LTV's establishment of abusive follow-on plans," and "its financial improvements," PBGC's Petition for Certiorari at 11, where nothing in ERISA prohibits the establishment of "follow-on" plans, and the administrative record:

a. provided no support for the agency's conclusion that the plans established by LTV were abusive "follow-on plans";

b. established that the agency failed to consider the federal bankruptcy law and labor law policies affected by restoration;

c. established that the agency's "financial improvement" rationale had several fundamental gaps in reasoning;

d. established that the agency did not consider LTV Steel's status as a debtor in bankruptcy in assessing LTV Steel's "financial improvement";

e. established that the agency did not assess the possibility that the restored plans would have to be reterminated; and

f. established that the agency did not apprise LTV of the material on which it would base its decision, give LTV an adequate opportunity to offer contrary evidence, proceed in accordance with ascertainable standards nor provide a statement showing its reasoning?

LIST OF PARTIES

The parent corporation, subsidiaries, and affiliates of respondents The LTV Corporation and LTV Steel Company, Inc., are listed in Appendix B of the Opposition to Petition for a Writ of Certiorari of October 11, 1989.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, AND WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE LTV CORPORATION AND LTV STEEL COMPANY, INC.

STATUTES INVOLVED

This case involves sections 4002, 4041, 4042 and 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1302, 1341, 1342 and 1347, see Pet. App. 133a-157a; the Bankruptcy Code, 11 U.S.C. §§ 1113, 1114; and the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), see Appendix A to the Opposition to Petition for a Writ of Certiorari.

PRELIMINARY STATEMENT

Contrary to the impression sought to be created by petitioner and *amicus*, this case is *not* about improper judicial construction of a federal agency's organic statute. Rather, this case is about a failure of administrative process with results contrary to federal reorganization and labor policies. That failure is demonstrated by the actual record before the Court. It is also demonstrated—and perhaps more pointedly—by the agency "discovering" and advancing, at each successive stage of appellate review, new justifications for its administrative action.

Petitioner Pension Benefit Guaranty Corporation (PBGC) was created by Congress to insure payment of retirement benefits. Yet for thirty months after taking administrative action the PBGC has dedicated its efforts to preventing thousands of workers and retirees from receiving benefits to which they are contractually entitled as a result of collective bargaining mandated by Section 7 of the Labor Management Relations Act and Section 1113 of the Bankruptcy Code. The agency's action to restore three LTV Steel pension plans cannot be supported by the minimal standards for informal adjudication. The action was taken pursuant to a vague "policy" of punishing employers who sign a collectively bargained agreement that alleviates some of the hardship caused by the involuntary termination of pension plans. By emphasizing to this Court this amorphous "policy" the agency and *amicus* ignore the conflict between that policy and other federal laws, the purpose of ERISA, the PBGC's own prior positions, and the actual administrative record here.

In an attempt to mask this failure of administrative process, petitioner and *amicus* now advance a new theory of "coinsurance", unsupported in the statute, legislative history, or the record. Then they raise the spectre of collusion between unions and employers to dump pension liabilities on the government. This explicit scare reference to the unrelated S&L problem totally confounds common sense, the unambiguous record in this case, and all known experience. Such belated and unfounded rationalizations cannot hide the agency's failure. As shown below, both the facts of this case and existing law fully support the rulings below.

STATEMENT OF THE CASE

The Financial Reasons for LTV's Bankruptcy Code Filing

On July 17, 1986 LTV, LTV Steel and its affiliates filed petitions for reorganization under Chapter 11 of the Bankruptcy Code. LTV Steel was the second largest steel company in the United States. It had been created by the merger of ailing steel companies — Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company and Republic Steel Corporation, Pet. App. 37a, with the expectation that through efficiency, LTV could survive the economic strains of the steel industry in the 1980s. *Id.* Unfortunately, continued economic pressures combined with foreign competition proved too formidable. Despite substantial concessions from its hourly employees represented by the United Steelworkers of America (USWA), Pet. App. 38a; JA 152, and other cost reductions, by summer 1986 LTV Steel was suffering record losses. Faced with impending defaults under credit agreements, no additional bank credit, and vanishing cash, LTV had no choice but to seek to reorganize under the Bankruptcy Code. JA 152

After the filings, LTV was permitted to continue to operate the businesses as debtors-in-possession for the benefit of its creditors and security holders. In the months after filing, LTV accumulated cash, a normal consequence of bankruptcy, since a debtor may not pay pre-petition debts until its assets have been marshalled and their distribution to all creditors assured. As a debtor-in-possession, LTV is attempting to maximize the value of its businesses and to accumulate cash so that all creditors, including its employees and the PBGC, may receive a fair recovery in a plan of reorganization.

The PBGC's Involuntary Termination of LTV Steel's Pension Plans

When it filed for reorganization LTV Steel had massive retirement obligations, including unfunded pension liabilities. Each steel company had brought its pension obligations to the merged entity.

To improve efficiency, LTV Steel had shut down extraneous facilities, thereby triggering retirement benefits to those laid off. Pet. App. 37a. As a result, LTV Steel's growing pension and retiree health liabilities rested on an ever shrinking base. By 1986 LTV Steel's 24,544 active workers supported 77,182 retirees and now 17,000 workers support 85,000 retirees. *Id.* The PBGC calculates that the total present value in 1986 of LTV Steel's unfunded liabilities for pension costs attributable to pre-Chapter 11 service exceeded $2 billion. *Id.*

Even before the bankruptcy filing, it was clear that LTV Steel could not remain a competitive steelmaker without restructuring its pension obligations. However, the hourly pension plans were established pursuant to collective bargaining agreements. As a matter of federal bankruptcy, labor and pension laws, LTV Steel could not voluntarily terminate its hourly pension plans without first bargaining with the USWA. 11 U.S.C. § 1113; 29 U.S.C. §§ 158(d), 159(a), 1341(a)(3) (1982 & Supp. IV 1986). The union adamantly opposed termination of the pension plans. Pet. App. 37a. At the same time, LTV Steel was prohibited as a matter of bankruptcy law from making contributions relating to pre-petition service to the pension plans. LTV Steel was stymied by these two legal mandates. Each month after the filing, LTV Steel's pension plans paid out $31 million in benefits but received no contributions for pre-petition service. As uneconomic facilities were shut down in the months after the bankruptcy filing, unfunded pension liabilities increased. Only involuntary termination by the PBGC could stop this escalating liability. JA 122.

By September, 1986 one plan — the Republic Retirement Plan — ran out of assets. The PBGC was compelled under the involuntary termination provisions of ERISA, 29 U.S.C. § 1342, to terminate that plan. JA 122. The PBGC never attempted to avoid this mandatory termination by moving to compel contributions; apparently the agency then accepted the principle that a debtor could not make contributions for benefits based on pre-petition service. On January 12, 1987, to "avoid an unreasonable deterioration of the Plans' financial condition or an unreasonable increase in the

liability of the PBGC's insurance funds," the PBGC petitioned to terminate involuntarily LTV Steel's three other pension plans. Pet. App. 42a. The PBGC terminated these plans even though it recognized that LTV Steel would accumulate "just over $1 billion by the end of 1988," because even that cash would be insufficient to "finance [both] a plan of reorganization and the ongoing [pension] Plans." JA 129. LTV consented to the terminations. Pet. App. 42a. The PBGC then filed claims exceeding $2 billion against each of the debtors. These claims, with those of all other creditors, will be paid pursuant to a plan of reorganization.

**The USWA Suit and Threatened Strike
Leading to the 1987 Interim Labor Agreement**

Unlike those of many companies, LTV Steel's pension plans had been structured to provide not only pensions but also many other benefits, including payments to disabled workers, benefits for spouses of employees who die in active service, and supplements to workers who lost their jobs as a result of plant shutdowns and who did not yet qualify for Social Security benefits. Pet. App. 42a. The PBGC's involuntary plan terminations therefore caused severe hardship to both retirees and active workers. *Id.* For example, an employee who had lost his job as a result of a plant shutdown lost half his monthly income; an employee counting the days until he would be eligible for a thirty year pension lost the ability to obtain this retirement benefit; an employee disabled after the termination received no payments; and a surviving spouse of an active employee similarly lost all benefits. Pet. App. 42a-43a; JA 242-243. The PBGC's guaranty is limited to basic pension benefits.

The union did everything possible to oppose termination and alleviate the hardships imposed on its members. The union

appealed the terminations of the hourly plans, Pet. App. 7a,[1] and sued to enforce the pension obligations in the labor contract.[2] The USWA argued that under Section 1113 of the Bankruptcy Code the contract is enforceable against a debtor-in-possession, and the PBGC itself had argued to the Third Circuit that this contract right survives plan termination. *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3rd Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982). Pet. App. 7a-8a; AR 694. The union backed its demands for hardship payments by threatening a strike which could have cost $100 million per month.[3] Pet. App. 8a, 43a-44a; JA 357.

Bargaining commenced. After weeks of intense and complicated negotiations, a tentative agreement was reached on May 13, 1987. Pet App. 8a, 44a. Then the local presidents rejected these terms.

1. The PBGC defended the terminations before the Court of Appeals, which on July 17, 1987 affirmed the involuntary termination orders. *Jones & Laughlin Hourly Pension Plan* v. *The LTV Corp.*, 824 F.2d 197 (2d Cir. 1987) and *Jones & Laughlin Retirement Plan* v. *The LTV Corp.*, 824 F.2d 202 (2d Cir. 1987).

2. The lawsuit is still pending and will be revived if the interim agreement which settled the action is found unlawful but the pension plans remain terminated.

3. At the very beginning of the LTV bankruptcy cases the USWA had struck LTV Steel's most important facility in response to LTV Steel's initial inability to pay retiree medical benefits. Pet. App. 43a-44a. To avoid irreparable harm to its reorganization prospects LTV Steel sought and obtained court authority to pay these benefits, *In re Chateaugay Corp.*, 64 B.R. 990 (S.D.N.Y. 1986), and Congress had unanimously passed a statute requiring full payment of retiree health benefits. *See* Pub. L. No. 99-591, 100 Stat. 3341, *amended by* Pub. L. No. 100-41, 101 Stat. 309 *and by* Pub. L. No. 100-99, 101 Stat. 716; *see also* Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified in part at 11 U.S.C. § 1114). The USWA had also struck the Wheeling-Pittsburgh Steel Company, another Chapter 11 debtor, for its failure to pay post-termination pension benefits, and USX Corporation, the nation's largest steel company. Pet. App. 43a-44a.

Id. The parties edged closer to a strike. Renewed bargaining produced a new contract, which the membership approved by a narrow vote. *Id.*; AR 1080.

The record here is far different from the hypothetical spectre advanced by the PBGC of unions "realigning" their interests with employers to dump pension liabilities on the Government. LTV Steel negotiated interim benefits only under the twin threats of a strong lawsuit and a devastating strike. Even then, LTV Steel was able to obtain significant concessions that offset the cost, but only after this resolution was first rejected by the local union officers.

The agreement is expressly designed as an interim arrangement to govern the parties' relationship during the period of reorganization. Pet. App. 8a, 44a; JA 154-155. Negotiation of a labor agreement for the period after bankruptcy will occur as a plan of reorganization is negotiated with all of LTV Steel's creditors. JA 155. The interim agreement provides that it will terminate if the hardship payments are found illegal. Pet. App. 44a; JA 155.

The agreement represents an effort by both LTV Steel and the USWA to meet the multiple challenges of this reorganization. The USWA made significant concessions which generate annual savings to LTV Steel of approximately $50 million. Pet. App. 45a. In return, LTV Steel agreed to new programs designed to relieve the hardships caused by the involuntary terminations of the pension plans. *Id.* The new programs for hourly employees have a total annual cost of about $70 million, gradually decreasing over time. *Id.*; JA 244-245. With savings from the concessions, LTV Steel's annual net cost is $20 million. Pet. App. 45a. LTV also established a comparable program to replace pension losses for salaried retirees. JA 161-162.

The programs implemented in the interim collective bargaining agreement (the "CBA Plans") include revised pension benefits for both active workers and retirees, as well as disability payments, surviving spouse benefits and plant shutdown protection. Pet. App. 45a; JA 157-160. The new programs developed in collective

bargaining differ substantially from the benefits provided under the terminated plans.[4]

4. The differences between the pre-termination plans and the post-termination programs are many. First, the basic plan for active employees is a defined contribution rather than a defined benefit plan. *Compare* JA 156, 214, 217-218, 220, AR 475 *with* AR 1180-1186, 1327-1340, 1435-1446. Monthly contributions to individual participants' accounts are based on service rendered after the effective date of the plan. JA 214. An employee's pre-termination service is relevant only in determining whether the Company's contribution is to be based on an hourly amount or a percent of earnings, or is to be increased by an additional fifty percent. JA 215-216, AR 477-479.

The new pension plan is not protected by the PBGC insurance program. *See* ERISA § 4021(b)(1), 29 U.S.C. § 1321(b)(1). At retirement a participant in a defined contribution plan receives only the benefits that can be purchased by the amount that has accumulated in his account. JA 220-221 In contrast, a participant in a defined benefit plan is entitled to a predetermined monthly benefit payable for his lifetime. AR 1180-1186, 1327-1340, 1435-1446.

The other new programs established as part of the interim agreement—the individual account trusts ("IAT"), the lump sum severance benefits, the extended supplemental unemployment benefit ("SUB"), the pre-retirement surviving spouse benefit and the disability income benefit ("DIB")—are also significantly different from the terminated plans. None of these programs is guaranteed by the PBGC. The IAT is not tax-qualified or tax-favored. Benefits are provided through a variety of sources, while all benefits under the terminated plans were provided under the plans; the new plans contain certain more restrictive age and/or service eligibility requirements; and length of service does not necessarily increase the amount of some benefits. The extended SUB and DIB are provided through trust funds which qualify as welfare funds under Internal Revenue Code § 501. JA 202, 208. Pre-retirement surviving spouse benefits are paid through an insurance company either through the Company's payment of premiums or the purchase of lifetime annuities. JA 178-179. IAT and lump sum severance benefits are paid as needed directly from corporate assets or a trust fund. JA 194, 210. The age and/or service requirements for various benefits provided under the IAT are more restrictive than were pre-termination requirements; *compare, e.g.*, JA 184-189 *with* AR 1178-1180, 1329-1345, 1429-1434; the amount of many benefits under the IAT, DIB, surviving spouse, and extended SUB plans is no longer increased by length of service; and there are significant differences in benefit amounts. *Compare, e.g.*, JA 177, 194, 198-201, 205, AR 477-479, 487-488 *with* AR 1181-1186, 1329-1340, 1435-1446.

After the collective bargaining agreement was approved by the local union presidents, the PBGC declared that aspects of the agreement, never specified, violated a PBGC "policy", never delineated, against post-termination benefits and therefore was abusive. LTV, the PBGC and the USWA held several meetings in July 1987 in an effort to clarify and resolve the PBGC's objections to the proposed agreement. Pet. App. 49a-50a. The validity of the post-termination programs was the only matter discussed; LTV Steel's financial status was not mentioned.

Bankruptcy Court Approval of the 1987 Interim Agreement

LTV Steel, with the support of its major creditor constituencies and the USWA, promptly sought approval of the interim labor contract from the Bankruptcy Court. At the July 16, 1987 hearing, LTV's witnesses testified without contradiction that the interim agreement was necessary to avoid a crippling strike and to permit LTV and LTV Steel to reorganize. Pet. App. 45a. The financial advisor to the Creditors' Committee, called by the PBGC, testified that he did not believe that a better agreement could have been reached, AR 554; that LTV Steel would nevertheless have difficulty surviving, AR 546-548; but that the "bet the company" risk of a strike was unacceptable. JA 258. Only the PBGC offered testimony opposing the contract. The Bankruptcy Court approved the interim agreement as necessary for the ongoing reorganization. JA 259.

> "Based upon the complete record before me today, including all filed papers, it has become abundantly clear that this Court may and should utilize its equitable power to authorize the terms and payments contemplated by the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor." Pet. App. 46a; JA 260.

The PBGC Abandons Appeal and Resorts to Perfunctory Administrative Restoration of the Plans.

Eight times, the PBGC's claim of "ERISA abuse" was heard and rejected in the Bankruptcy Court, in the District Court and in the Court of Appeals as the PBGC sought to stop approval and implementation of the agreement. Pet. App. 46a. The PBGC's appeal of the bankruptcy order approving the agreement would have resulted in complete vindication of its supposed policy had the PBGC been successful.

Yet, the PBGC chose to abandon the appeal and to achieve its goal through a charade of informal adjudication. The PBGC Board had not met in eight years. Now, it held a perfunctory fifteen minute telephone meeting, AR 598, and gave blanket approval to any restoration action the PBGC Executive Director might take. Pet. App. 49a. The Executive Director testified that she reviewed what she described as a "pile" of documents, J.A.Ct.Ap. 1035-1036, which subsequently became the entire administrative record. The Executive Director then sent LTV the first Notice of Restoration ever issued by the PBGC. Pet. App. 182a. The Notice restored three of the four terminated plans. It failed to explain why the fourth, to which the same "abuse" theory and claim of changed financial circumstances could be applied, was not restored. Pet. App. 125a n.44.[5]

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5. The PBGC now states for the first time that the fourth plan was not restored because its assets were exhausted. PBGC Br. at 37 n.23. In the administrative record the agency stated, however, that the fourth plan was not restored because the agency expected to recover in full on its claim for the plan. JA 320.

In fact, ERISA compels termination where a plan's liquid assets are exhausted. 29 U.S.C. § 1342(a). In the three years since the pension plan terminations, benefits have been paid to retirees from the three plans the agency seeks to restore at a rate of approximately $26 million per month. At least one, the J&L Hourly Plan, is now out of assets. The other plans will soon exhaust their assets.

The PBGC cited three bases for the administrative action of restoring the plans: (1) LTV Steel's "abuse" of ERISA in establishing the post-termination programs negotiated with the USWA and approved by the Bankruptcy Court as necessary for reorganization; (2) "LTV Steel's improved financial circumstances"; and (3) "LTV Steel's demonstrated willingness to fund employee retirement arrangements." Pet. App. 182a. No further explanation or analysis was set forth in the Notice.

Since then, when called upon to explain its action the PBGC has abandoned on appeal grounds for its action,[6] asserted on appeal justifications never actually considered by it, and attempted to substitute bulk mass for considered analysis. What the administrative record reveals, at best, is a haphazard process of inadequate factual development and faulty analysis, as the courts below found. At worst it is governmental action for an undisclosed purpose[7] sought to be justified by *post hoc*, unfounded theories.

While the PBGC says the record is voluminous, in fact the PBGC relies upon fewer than ten pages of the administrative record to explain its administrative action. The basis for the PBGC's finding of "abuse" is set forth in three conclusory paragraphs of one PBGC affidavit prepared after restoration. AR 224-225; *see* Pet. App. 108a. Three pages of another document record what the PBGC claims is a financial "analysis", a rudimentary paper purporting to compare a projection of LTV Steel's cash flow and minimum cash

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6. The PBGC never demonstrated the legal or factual relevance of "willingness," and before the Court of Appeals it abandoned any reliance on this premise for restoration. Pet. App. 25a.

7. Restoring plans which have no assets is a futile act requiring prompt retermination. The law has changed since the original termination, and the liabilities of the plans have increased. If the PBGC can restore and immediately reterminate these plans, the PBGC would succeed in manipulating the termination/restoration process to increase its bankruptcy claim from $2 billion to more than $3 billion, to the detriment of other creditors.

needed to fund the pension plans, if LTV had no other obligations. AR 12-14; *see* Pet. App. 114a. Notable is the absence from the administrative record of any agency consideration of future plant shutdowns. This factor, which the agency now claims was "central to its decision to terminate the Plans," PBGC Br. at 12, was raised by the agency as a factor in restoration for the first time in its appeal to the Second Circuit.[8]

The PBGC's administrative record shows that both the terminations and restoration were based in essence on the same evidence — the same two-year business plan, Pet. App. 112a-113a, even though the PBGC knew that a new seven-year business plan would be made available within days. Pet. App. 128a n.46. With reference to that two year business plan, the PBGC staff stated at the first meeting to discuss *restoration* that at the time of *termination* a "financial analysis presented to the group based on LTV's most optimistic projections indicated that LTV could not make the required contributions to meet the minimum funding requirements". Pet. App. 113a n.37. The only additional information considered was the debtor's performance and its expected accumulation

8. While the PBGC contends that estimated shutdown liabilities of $300 to $700 million were anticipated at the time of termination but no longer at the time of restoration, PBGC Br. at 9, 12, in fact all of the shutdowns anticipated at LTV Steel's non-operating facilities had occurred prior to termination. JA 134, 135. The record shows that in December 1986 no shutdowns were scheduled for 1987, and only one partial shutdown (which did not occur) was assumed, though not scheduled, for mid-1988. JA 41. LTV's 1986 Form 10-K does not describe any anticipated shutdowns. JA 132-134. Nor do the Forms 10-Q of either LTV or LTV Steel for the first quarter of 1987. JA 143-146. No threat of major additional shutdown liability loomed over the PBGC at the time of termination. Therefore, the belated claim that such a threat suddenly vanished in mid-1987 is unsupportable. While the PBGC cites as a revelation LTV Steel's July testimony that no major shutdowns were anticipated, JA 255-256, this testimony is consistent with the facts at the time of involuntary termination as reflected in the administrative record. JA 41.

of cash while in Chapter 11 in the first five months of 1987. Pet. App. 113a.

The PBGC's analysis assumes that all of LTV Steel's cash, accumulated as a result of the debtor's inability as a matter of bankruptcy law to pay its creditors, and all of its future cash flow, should be applied to fund its pension plans. This "analysis" ignored LTV Steel's obligations to its other creditors under the Bankruptcy Code.[9] The PBGC's financial analysis also made unexplained assumptions, including the extraordinary proposition that the union's $50 million in concessions would stay in place even if the interim labor agreement were voided by restoration, and that IRS funding waivers that had previously been denied would be granted. At the same time, the PBGC failed completely to consider the effect of bankruptcy or labor law on its restoration decision, even though those important federal policies were at odds with the agency's use of its restoration authority here.

Decisions Below

In the District Court the PBGC moved for summary judgment to enforce its administrative restoration. On July 22, 1988, the District Court vacated the Notice of Restoration. *In re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988), Pet. App. 28a. The PBGC appealed, and the Court of Appeals for the Second Circuit Court affirmed, finding that "the intentions of ERISA, bankruptcy and labor law belie . . . [the] assertion" that the agency could base restoration on abuse. Pet. App. 17a. The Court also held, "Even when we examine the factors upon which PBGC did base its decision, we find no

9. In order for LTV Steel to reorganize and avoid liquidation it must pay creditors under a plan of reorganization at least what they would receive in a Chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7). If LTV Steel were forced to put all of its cash into the pension plans, it could not propose a plan of reorganization which would meet the "best interest of creditors" test, and its creditors would force liquidation under Chapter 7 in order to maximize their recovery.

support in the administrative record for the conclusion reached," Pet. App. 17a, specifically finding that:

(a) the PBGC had no support in the administrative record for its conclusion that the CBA Plans were abusive "follow-on" plans. Pet. App. 19a.

(b) the PBGC "financial improvement" rationale was based on "fundamental, yet unexplained and unexamined assumptions." Pet. App. 22a.

(c) the PBGC "did not effectively assess the impact that LTV's status as a debtor in Chapter 11 reorganization had on its financial condition." Pet. App. 23a.

(d) "[N]owhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated." Pet. App. 25a.

(e) "PBGC neither apprised LTV of the material on which it was to base its decision, gave LTV an adequate opportunity to offer contrary evidence, proceeded in accordance with ascertainable standards . . . nor provided a statement showing its reasoning in applying those standards." Pet. App. 26a.

SUMMARY OF ARGUMENT

The holdings of the District Court and the Court of Appeals vacating the notice of restoration and remanding the matter to the agency are compelled by settled principles of statutory interpretation and the basic requirements of judicial review of administrative action.

1. The interim agreements that the agency labels "abusive" were the product of LTV's obligations under bankruptcy law and labor law. This Court has stressed the importance of balancing the multiple, competing considerations within bankruptcy reorganization, and Congress has mandated that the collective bargaining process and labor contracts be given a special place in the reorganization process. Here, the negotiation of retirement benefits is a mandatory subject of bargaining, and nothing in ERISA authorizes the PBGC to invalidate a labor contract incorporating such terms and conditions of employment. The agency's abuse policy has no basis in law. At minimum, the agency's failure here even to consider the significant federal policies of other statutes which directly led to the development and bankruptcy court approval of the interim agreement renders its restoration action arbitrary and capricious.

2. The agency's abuse policy is fundamentally inconsistent with the agency's duties under ERISA. The central purpose of ERISA is to ensure that employees obtain the full benefits to which they are contractually entitled. The agency has recognized employees' contractual right after termination to recover non-guaranteed benefits directly from the employer. Moreover, Congress has specifically endorsed employers' payments of non-guaranteed benefits after termination by amendments to ERISA that expressly provide for the collection and distribution of amounts in excess of guaranteed benefits.

3. In any event, the agency's asserted policy against abusive follow-on plans is logically irrelevant to restoration. Financial improvement is a *necessary* condition for restoration — since to "restore" plans to an entity that cannot afford them would be a meaningless exercise leading to immediate retermination — and a *sufficient* condition for restoration — in that the agency need find nothing other than financial improvement to justify restoration.

4. The agency's determination that the financial condition of LTV Steel had improved such that LTV Steel could afford the previously terminated plans was arbitrary and capricious. Perhaps because this ground for restoration was an afterthought, the agency did not consider the possibility that the plans, if restored, would have to be reterminated; failed to consider that LTV was in bankruptcy and unfunded liabilities relating to pre-petition service gave rise to pre-petition claims which could be paid, with others of equal status, only at the time of confirmation of a plan of reorganization; did not consider that any apparent "improvement" in cash was due to the expected accumulation of cash in bankruptcy; articulated no reviewable standard of financial improvement; and based its financial improvement conclusion on "fundamental, yet unexplained and unexamined assumptions" concerning the company's ability to modify ERISA funding standards and to retain the benefit of concessions negotiated in exchange for the follow-on plans. Pet. App. 22a.

5. The Court of Appeals' criticism of the procedure by which the agency reached its restoration decision raises no issue under *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978). To fulfill its obligations under the Administrative Procedure Act, and consistent with the common law of informal adjudication, the Court was authorized to ensure a process consistent with fundamental fairness and the existence of a record adequate to permit judicial review of the agency's decision. Since no procedures for informal adjudication are articulated in the Administrative Procedure Act or in ERISA, a court is permitted to draw on common law to suggest the basic elements of fair process. The discussion of PBGC procedures should be regarded as part of the Court's examination of the PBGC's "failure to develop a complete, reviewable record," Pet. App. 123a, as required by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416-417 (1971).

ARGUMENT

POINT I

The Agency Acted Outside its Statutory Authority in Basing Restoration on "Abuse"

The PBGC acted outside its statutory authority in using restoration to enforce an asserted policy against abusive follow-on plans. The agency cannot declare the provision of interim benefits abusive without taking account of the federal bankruptcy and labor law that directly led to the interim agreement. It is this Court's responsibility to accommodate ERISA's policies on restoration with the competing considerations of other federal laws. The searching inquiry required in review of informal adjudication demonstrates that the PBGC's "abuse" policy has no legal foundation. Even if it is valid in some circumstances, the agency's failure to consider the relevant factors in this case compels the conclusion that its action here was arbitrary and capricious.

Even without looking beyond the agency's enabling statute, the agency's policy of punishing employers for attempting to mitigate the hardships imposed on employees and retirees by termination violates ERISA. Moreover, even if follow-on plans are found to be unlawful, the logical remedy is to invalidate them, not to restore plans which LTV Steel cannot afford and which would have to be reterminated promptly. Follow-on abuse is logically irrelevant to the restoration decision.

Judicial review of this category of agency action is governed by the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of 5 U.S.C. §706(2)(A) ("APA"). Even in informal adjudication, the court must engage in a "thorough, probing, in-depth" review to determine whether the agency's decision-making process was reasoned, took into account all relevant policies and information, and reached a result consistent with congressional intent. *Overton Park*, 401 U.S. 402 at 415-417; *Sierra Club* v. *United States Army Corps of Eng'rs*, 772 F.2d 1043, 1051 (2d Cir. 1985). A reviewing court must determine whether the agency's stated explanation for its action is "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), *quoting Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Belland* v. *PBGC*, 726 F.2d 839, 845 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984). This searching inquiry is designed to ensure that all government agencies respect the limits of their enabling law and the requirements of fair process whenever they adjudicate the rights or interests of affected parties.

The PBGC, as any agency, is obliged to give consideration to competing policies if its actions implicate national policy beyond its area of expertise. Any possible conflict must be recognized, and any agency action must be narrowly drawn to accommodate such national policies. *See, e.g., Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174 (1962); *LaRose* v. *FCC*, 494 F.2d 1145, 1146 n.2, 1147-50 (D.C. Cir. 1974).

ERISA Section 4047, 29 U.S.C. § 1347, requires the agency to determine whether restoration would be "appropriate and consistent with its duties" under Title IV of ERISA. This minimal requirement, an inherent limitation on any agency's action, plainly cannot support the PBGC's claim that it can blithely precipitate conflicts with major labor law and bankruptcy policies. Moreover, the restoration decision here is based on an asserted agency policy that is fundamentally contrary to the agency's purpose and duties under ERISA. The restoration notice must remain vacated.

A. The Agency Could Not Declare the Interim Benefits "Abusive" Without Considering the Major Federal Policies that Led to Their Creation

In restoring three of the four terminated plans the PBGC ignored both federal bankruptcy and labor law. Both of these bodies of federal law serve important national goals recognized by Congress and this Court. Particularly given the imprecise provisions of Section 4047 of ERISA, the PBGC was obliged to heed these laws, and accommodate the way they intersect with ERISA, when deciding to restore three terminated pension plans.

Under the Bankruptcy Code, the reorganization process is intended to restore a sick company to health by freezing individual creditor demands until a plan of reorganization can be formulated. In its design of Chapter 11, Congress has mandated that all creditor claims of equal priority be treated equally. If any single creditor is permitted to contravene this design by leapfrogging the rest, the entire process will fail. Reorganizations are favored in the statutory scheme. "The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders .... If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. &

Admin. News 5963, 6179. This Court has long recognized the special nature of reorganization proceedings, and the protection to be given to the reorganization process. *Continental Illinois Nat'l Bank & Trust Co.*, v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 676 (1935).

The two central policies served by reorganization are the fresh start given to a debtor and the fair and equitable distribution of the debtor's assets to similarly situated creditors. *Continental Illinois, 294 U.S. 648 (1935); see also NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 202 (1983); *In re A&B Heating & Air Conditioning*, 823 F.2d 462, 465 (11th Cir. 1987), *vacated on other grounds*, 108 S.Ct. 1724 (1988).[10] To ensure that the policy of equitable treatment is served, the "multiple, competing considerations underlying a Chapter 11 reorganization" may not be subordinated to one issue or policy. *Bildisco*, 465 U.S. at 525; *Whiting Pools*, 462 U.S. at 209; *see also In re A&B Heating and Air Conditioning*, 823 F.2d 823 F.2d 462, 465 (11th Cir. 1987), *vacated on other grounds, 108 S.Ct. 1724 (1988); In re Century Brass Products, Inc.*, 795 F.2d 265, 274-75 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986).

By exercising economic leverage at the bargaining table with a debtor-in-possession, a labor organization may have a disproportionate advantage in the reorganization process. However, following this Court's ruling that a labor contract was subject to rejection by the bankruptcy court, Congress enhanced the legal protections for collective bargaining agreements because the bargaining process is a cornerstone of national labor policy. 11 U.S.C. § 1113.[11]

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10. When the Bankruptcy Court granted LTV's application to approve the interim labor agreement, it found it "abundantly clear that this Court may and should utilize its equitable power to authorize . . . the agreements as they are clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor." AR 622.

11. "A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.... Central to achievement of this purpose is the pro-

Both the weight ascribed by the Court to the fundamental principles of reorganization and the special recognition given labor contracts and the collective bargaining process are illustrated by the *Bildisco* case and its legislative aftermath. In *Bildisco*, this Court had recognized the "special nature of a collective-bargaining contract," but had ruled that collective bargaining agreements were not to be treated in a reorganization case differently from other contracts. 465 U.S. at 524. In response, Congress enacted Section 1113, which imports fundamental principles of labor law into the Bankruptcy Code. Section 1113 is intended to encourage the collective bargaining process. *Century Brass*, 795 F.2d at 273. A debtor must negotiate in good faith over any proposed modification of a labor contract. *Truck Drivers Local 807* v. *Carey Transp. Inc.*, 816 F.2d 82, 89 (2d Cir. 1987). Mandatory subjects of bargaining include "pension and insurance benefits for active employees," *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971), and "such 'non wage' benefits as ... group health insurance." *Connecticut Light & Power Co.* v. *NLRB*, 476 F.2d 1079, 1081 (2d Cir. 1973). Under Section 1113, retiree benefits are also a subject of mandatory bargaining during a reorganization proceeding. *Century Brass*, 795 F.2d at 274.

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motion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981). "The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements ... between unions and employers .... Enforcement of the obligation to bargain collectively is crucial to the statutory scheme." *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952); *see Bildisco*, 465 U.S. at 526; *Int'l Ass'n of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). At the core of the obligation to bargain collectively is the duty to bargain over mandatory subjects of bargaining, the areas in which "neither party is legally obligated to yield." *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

However, Congress maintained the structural goals of reorganization in Section 1113. "[A]ll creditors, the debtor and all of the affected parties are treated fairly and equitably." 11 U.S.C. § 1113(b)(1)(A). "The purpose of this provision ... 'is to spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree'." *Carey Transp.*, 816 F.2d at 90, *quoting Century Brass*, 795 F.2d at 273. *See generally Nathanson* v. *NLRB*, 344 U.S. 25, 28 (1952) ("The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act"); *NLRB* v. *Martin Arsham Sewing Co.*, 873 F.2d 884, 886-87 (6th Cir. 1989) ("The equitable distribution principles of the Bankruptcy Code apply to the NLRB notwithstanding the Board's broad powers to effectuate the public purposes of the NLRA").

Here, had the PBGC not involuntarily terminated LTV Steel's pension plans, LTV Steel would have attempted to use Section 1113 to modify its 1986 agreement and to commence voluntary termination of its pension plans. However, the obstacles were considerable. The USWA did not support termination, and use of Section 1113 to reject the labor contract, even if the economic test were satisfied, created the risk of a crippling strike. That risk was crystallized after the PBGC terminated the plans, and the USWA brought suit, contending that the PBGC's involuntary termination abrogated LTV Steel's 1986 labor agreement in violation of Section 1113. A strike was narrowly averted by the interim agreement, as the Bankruptcy Court found when approving it.

The PBGC contends that it properly ignored this entire process, mandated by two bodies of federal law, because Section 4047 requires that before the agency restores a plan it need only determine that restoration is internally consistent with its enabling act. PBGC Br. at 40. This requirement (which is not even met in this case, see *infra* at 23-32) articulates an inherent limitation upon every agency action, *see, e.g., Bureau of Alcohol, Tobacco &*

Firearms v. *FLRA*, 464 U.S. 89, 97 (1983). The agency cannot transform this self-evident proposition into the plainly preposterous one that it is entitled to deference when it declares that its actions pose no conflict with other federal policies. The agency's declaration that its action does not conflict with the major federal statutes that led to the provision of interim benefits is entitled to no deference. *See, e.g., Ohio Power Co.* v. *Federal Energy Regulatory Comm'n*, 880 F.2d 1400, 1405 (D.C. Cir. 1989) ("When an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is entitled to no deference"); *Colorado Nurses Ass'n* v. *FLRA*, 851 F.2d 1486, 1488 (D.C. Cir. 1988) ("Because the FLRA's decision required it to reconcile its organic statute with a statute not within its area of expertise, we owe it no particular deference");[12] *Curtis* v. *Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 808 (3rd Cir. 1988); *Parola* v. *Weinberger*, 848 F.2d 956, 959 (9th Cir. 1988); *Whalesy* v. *Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981). This Court must undertake to accommodate the agency's policy with federal labor law and bankruptcy law. That accommodation must lead to the conclusion that restoration cannot be based on an interim agreement that was the direct product of these two major federal policies. At the very least the agency's failure even to consider these two bodies of federal law renders its action arbitrary and capricious.

12. This principle has been stated repeatedly in the context of judicial review of decisions of the Federal Labor Relations Authority. *See e.g., Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179, 1181 (6th Cir. 1989); *Illinois Nat'l Guard* v. FLRA, 854 F.2d 1396, 1400 (D.C. Cir. 1988); *United States Dep't of Navy* v. *FLRA*, 840 F.2d 1131, 1134 (3d Cir. 1988); *Department of Treasury* v. *FLRA*, 838 F.2d 1341, 1342 (D.C. Cir. 1988); *Department of Treasury* v. *FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); *Department of Navy* v. *FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988); *Veterans Admin. Medical Center* v. *FLRA*, 732 F.2d 1128, 1132 (2d Cir. 1984).

The agency's contention that it is not obligated to consider "countless policies . . . arguably relevant" to its actions, PBGC Br. at 41, is a diversion. Neither the District Court nor the Court of Appeals imposed such an obligation. Rather, the agency is required to consider the major factors leading to the particular agreement at issue; the PBGC's contrary position blatantly violates this Court's expression of the importance of balancing "multiple, competing considerations" within Chapter 11, *Bildisco*, 465 U.S. at 525, the policy of fair and equitable treatment of creditors which that expression serves, and Congress' expressed mandate that the collective bargaining process and the goals of national labor policy be given a special place in the Chapter 11 process.

B. The Agency's "Abuse" Policy Is Fundamentally at Odds with ERISA

Even if we focus inquiry on the agency's enabling statute, the PBGC's "abuse" policy is fundamentally contrary to its purposes and duties under ERISA. The agency cannot enforce a policy specifically designed to deprive employees and retirees of contractually promised pension benefits.

1. The Bedrock Purpose of ERISA Is the Protection of Full Pension Benefits

The basic purpose of ERISA is to protect the pensions contractually promised to millions of employees, and to ensure that "pension expectations not be eliminated by business or pension plan failure." 120 Cong. Rec. 4446 (1974). ERISA was enacted to address "the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives." S. Rep. No. 127, 93d Cong., 2d Sess. 1, *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4838. *See*, 29 U.S.C. § 1001b(c)(3) (Supp. IV 1986) ("It is hereby declared to be the policy of this title . . . to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full

benefits . . . .") As this Court has observed, "[o]ne of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated . . . . Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he actually will receive it." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374 (1980).

Consistent with the goal of ERISA, employees whose pension plan had been involuntarily terminated may sue an employer directly for the difference between the payments guaranteed by the PBGC and those provided in the labor contract negotiated between the employer and the union representing employees. *Heppenstall*. In *Heppenstall* the PBGC as *amicus* supported the employees' right to recover directly from the employer, arguing that ERISA did not void existing pension contracts and did not impose a cap on the payment of non-guaranteed benefits. "[A]n employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA." PBGC Amicus Br. in *Heppenstall*, p. 3.[13]

13. After the agency involuntarily terminated the LTV Steel plans, the USWA initiated a *Heppenstall* lawsuit against LTV Steel for the full amount of benefits set forth in the pension agreements. The pension agreements had provided the specific contractual guarantee that "[a]ny benefit properly payable pursuant to this agreement shall continue to be payable, notwithstanding the termination . . . of this Agreement." AR 1478. The interim agreement was entered into in settlement of this lawsuit. JA 166-167. The lawsuit will be revived if the new agreement is found illegal.

The Solicitor General's discussion of *Heppenstall*, U.S. Br. at 15 n.8, conveys the incorrect impression that the agency has recognized employees' contractual rights to non-guaranteed benefits only where the agency has recovered the full amount of the unfunded benefits it has guaranteed. In fact, at the time of the *Heppenstall* decision, ERISA limited the amount of unfunded benefits recoverable by the PBGC to 30% of the employer's net worth. 29 U.S.C. § 1362(b)(2). The *Heppenstall* court observed:

Finally, not only does ERISA have an overarching purpose to protect full pension benefits, Congress also has specifically endorsed employers' payments of non-guaranteed benefits after termination. In the Single Employer Pension Plan Amendements Act of 1986 ("SEPPAA"), its 1986 amendment of ERISA, Pub. L. No. 99-272, 100 Stat. 237 (1986), Congress expressly provided for collection and distribution of amounts in excess of PBGC guaranteed benefits. The claim of the Section 4049 trustee for non-guaranteed benefits has equal standing in Chapter 11 with the PBGC claims for unfunded liability attributed to pre-petition service. ERISA Section 4049, 29 U.S.C. § 1349 (Supp. IV 1986).[14] Moreover, in the 1987 amendments, Pension Protection Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) ("PPA"), which were not in effect at the

"It is not inconsistent with the statutory scheme [of ERISA] to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself. *While the effect of permitting that additional recovery may reduce the employer's net worth, and thus decrease the amount the PBGC may recover from the employer, the PBGC in its amicus brief to this court has taken a position supporting the employees' right to recover directly from the employer.*" *Heppenstall*, 635 F.2d at 239 (emphasis supplied).

The Solicitor General's discussion might also convey the incorrect impression that Congress has endorsed the concept that employees' contractual right to recover from the employer non-guaranteed benefits somehow does not arise unless the agency has first received the full amount of unfunded benefits it has guaranteed. The 1987 amendment cited by the Solicitor General, 29 U.S.C. § 1322(c) (Supp. V 1987), in fact does the opposite. It requires the PBGC to pay some non-guaranteed benefits even if it has *not* recovered the full amount of unfunded guaranteed benefits.

14. In 1987, the PPA repealed Section 4049 in favor of a broader mandate that the PBGC directly collect 100% of all pension benefits, guaranteed or not, and distribute a proportionate amount to beneficiaries. 29 U.S.C. § 1362(b)(1)(A) (West Supp. 1988).

time of the termination of the LTV Steel plans, Congress provided that the PBGC allocate a portion of its recovery to employees as non-guaranteed benefits even if the agency has not recovered the full amount of unfunded guaranteed benefits. 29 U.S.C. § 1322(c) (Supp. V 1987).

2. The Agency Cannot Use Restoration to Enforce a Policy Fundamentally Contrary to its Duties Under ERISA

The effect of the agency's "abuse" policy is to prohibit an employer from mitigating the hardship of termination.[15] Without regard to the employer's financial condition, the agency will use restoration to punish the employer who eases the hardship caused by the loss of non-guaranteed benefits by implementing benefit plans, even though the PBGC would have no interest in a wage increase, additional vacation time, or increased medical benefits implemented for the same purpose.[16] PBGC Br. at 8; U.S. Br. at 24-25. This policy is irrational. It is also contrary to the PBGC's basic duties under ERISA. As a result, this restoration decision was arbitrary and capricious. "The judiciary is the final authority on

15. The agency has conceded that it does not object to the establishment of new plans that provide retirement benefits for post-termination service. PBGC Br. at 7 n.8. Thus this aspect of the CBA plans apparently does not run afoul of the agency's abuse policy.

16. The agency strains to avoid a straightforward description of its policy by stating that, if employees receive a significant portion of non-guaranteed benefits, then the plan has not really been terminated. PBGC Br. at 29. This statement is not tenable. The entire structure of ERISA bases termination on the financial condition of the plan and the employer. *See* 29 U.S.C. §§ 1341, 1342; *supra* Point I.A. As the agency has conceded, the Republic Retirement Plan remains terminated because it cannot afford to pay benefits when due — even though the agency's entire follow-on plan argument is equally applicable to the Republic Retirement Plan, whose participants are receiving the same hardship payments.

issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). "[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.... Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act . . . they must not rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97, *quoting American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), and *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965) (internal quotations omitted).

Before this Court (but nowhere in the administrative record)[17] the agency attempts to bolster its abuse policy by contending that, unless it can prevent employers from easing the pain of termination, employers and employees will conspire to terminate plans. PBGC Br. at 28-29.

There is no evidence — in the record of this case or anywhere else — to suggest that unions are prepared to modify their uniform hostility to plan termination. The USWA did all in its power to oppose termination of the LTV Steel plans. It appealed the terminations of the hourly plans and initiated a lawsuit against LTV Steel for the provision of full pension benefits. The USWA also

17. *See* Pet. App. 109a-110a (District Court, referring to argument in PBGC brief that "it could become routine for employers to file for bankruptcy primarily to escape their pension benefit obligations," observed that the argument "is unsupported by any facts or even expert opinion in the Record, and the Record does not contain any analysis of the extent of any such threat, if realized").

threatened a crippling strike against LTV Steel. An agency cannot support a policy with hypothetical "facts" that do not exist in any experience. "It is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.'... Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for the administrative action." *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (opinion of Stevens, J.), *quoting Motor Vehicle Mfrs. Ass'n* at 43.

Even if one assumes *arguendo* that the agency's abuse policy might help ease its budget problems, the agency cannot, simply in order to save money, adopt a policy contrary to its basic duties, any more than it could save money by refusing to pay out guaranteed benefits when due. A policy designed to discourage employers' provision of non-guaranteed benefits is contrary to the entire scheme of benefit insurance, and contrary to the claims against employers established by Congress in designing ERISA.

Moreover, in successive amendments to ERISA, Congress has addressed the possibility of abusive shifting of plan liabilities by tightening termination criteria, a remedy that is consistent with the basic purposes of the statute.[18] Prior to 1986, an employer could terminate a plan regardless of whether the plan had assets sufficient to pay all PBGC guaranteed benefits and whether or not the employer could afford to continue the plan. The employer determined in its sole discretion when a termination would occur, thereby controlling

18. The Brief of the Solicitor General fails to acknowledge that the statutory scheme in effect when the PBGC involuntarily terminated the LTV plans is not the one that exists today. Since termination of the LTV plans, ERISA has been substantially amended specifically to address the concerns that the PBGC claims motivated its "abuse" policy. *See infra* at 28-30; Opp. to Cert. Pet. at 12-13.

the incidence of any claim against it by the insurance program and by beneficiaries against the insurance program and, to some extent, the amount of such claim. H.R. Rep. No. 241, part 2, 99th Cong., 2d Sess. at 32, 41, *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 689, 699 (hereinafter "House Report"); *see In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 651 (2d Cir. 1983).

Congress identified two types of resulting abuses: profitable employers with low net worth terminated their plans either to transfer their unfunded pension liabilities to the PBGC, or to evade responsibility for paying benefits not guaranteed by the PBGC. House Report at 41-42, *reprinted in* 1986 U.S. Code Cong. & Admin. News at 699-700; *see also* "Findings and Declaration of Policy," 29 U.S.C. § 1001b(a)(4) (Supp. IV 1986). These abuses did not result from PBGC involuntary terminations, which cannot be controlled by an employer. The PBGC institutes involuntary proceedings, as it did here, only after it determines that a plan has not met minimum funding standards, that a plan is unable to pay benefits when due, or that "the possible long-run loss of the [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4). Nor did the abuses result from the legal restrictions imposed on a Chapter 11 debtor.

Congress addressed perceived abuses of the voluntary termination provisions by revising the termination standards. Under SEPPAA an employer could proceed by way of a "standard termination" only if a plan contained sufficient assets to pay not only guaranteed but also certain non-guaranteed benefits. 29 U.S.C. §§ 1301(a)(16), 1341(b) (Supp. IV 1986). Otherwise, an employer would have had to meet the stringent conditions for a "distress termination." Under the PPA these conditions were made even more stringent, requiring that the employer be in reorganization proceedings, that the bankruptcy court approve the termination, and that termination be necessary to permit the employer to continue in business. 29 U.S.C. § 1341(c)(2)(B) (West Supp. 1988).

Congress has also considered, and rejected, a PBGC proposal to ban follow-on plans. Throughout 1987 Congress considered various amendments to ERISA in relation to termination liability with the understanding, as noted in a House Ways and Means Committee's report, that "[u]nder present law" an employer, following a voluntary plan termination, "may continue or attempt to establish a plan that provides retirement benefits to employees," including a plan "designed to provide the same benefits as the terminated plan" less PBGC benefits. H.R. Rep. No. 391(II), 100th Cong., 1st Sess., 1010, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-378, 2313-627 (hereinafter "Ways & Means Report"). Two proposals were made to change the *status quo*. The "Administration's Proposal on the Funding and Termination of Defined Benefit Pension Plans," endorsed by the PBGC, contained a provision in the termination section that prohibited "plan reestablishments" for five years after termination of an underfunded plan. Pet. App. 97a n.28. The House Ways and Means Committee proposed a five-year prohibition on the establishment of "replacement plans" following a voluntary distress termination. Ways and Means Report at pp. 1011-12, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-628-629. However, the three other Congressional committees which passed related legislation declined to adopt any similar provisions. While the bill that passed the House contained the five year prohibition, the Conference Committee which developed the finally enacted bill determined not to adopt it. H. Conf. Rep. No. 495, 100th Cong., 1st Sess., 881-885, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1627-1631. The PPA therefore contains no limitations on new benefit plans adopted after a plan termination.

This explanation of the legislative history of and subsequent amendments to ERISA merely supports the conclusion, compelled by the plain language of Section 4047, that the agency cannot use

restoration to enforce a policy that is flatly contrary to its duties under ERISA.[19]

The agency cannot salvage its fundamentally invalid "abuse" policy by complaining about the Court of Appeals' use of legislative history. PBGC Br. at 24-25; U.S. Br. at 19-20. Before that court the agency characterized follow-on plans as "patently at odds with the legislative purpose" of the agency. PBGC Brief before Court of Appeals at 8. The court correctly examined the agency's

19. In this section, respondents assume *arguendo* that the agency has an ascertainable abuse policy that was applied in the LTV restoration decision. In fact, however, the agency's "policy" remains quite obscure. To describe what actions are condemned by its policy, the agency continues to point to three opinion letters, concededly "not binding on the public or the courts," PBGC Opinion Letter No. 87-7, July 21, 1987, describing situations that bear no resemblance to the situation of LTV. *See infra* at 35-36. At the same time, the agency has endorsed the payment of full non-guaranteed benefits by an employer following termination, *Heppenstall*; *see supra* at 24, and has conceded that it has no objection to the establishment of post-termination plans based on post-termination service. PBGC Brief at 7 n.8. An employer who paid in full all non-guaranteed benefits to which its employees were entitled based on their service up to the moment of termination, and initiated a new plan based on all service since termination, would have eliminated the hardship of termination for its employees far more completely than has LTV in this case. *See supra* at 8 (describing numerous differences between terminated plans and CBA plans).

The PBGC has conceded that provision of 75% of non-guaranteed benefits would not violate its policy since the section 4049 trustee was charged with collection and distribution of up to 75% of non-guaranteed benefits. 29 U.S.C. § 1349 (Supp. IV 1986). The interim labor agreement calls for payment of an average of 92% of the non-guaranteed benefits for retirees. The difference in this multi-billion dollar case between the 75% and the average 92% non-guaranteed benefit payment is approximately $6 million annually. A strike of only two days duration would cost LTV and its creditors, including the PBGC, more. Thus, just as it was prior to restoration, *see* JA 256-257, LTV remains unable to discern what the PBGC's abuse policy actually is.

enabling statute and its legislative history to conclude that the agency's claim was baseless, and that "there [is] no indication that the establishment of follow-on [plans] is impermissible" under ERISA. Pet. App. 19a. In this analysis, the court was permitted to note the subsequent legislative history that confirms the conclusion compelled by the plain meaning of the statute. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) ("[a]lthough subsequent legislative history is not dispositive," it supported the Court's interpretation of provision at issue); *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) ("subsequent legislative history" of statutory provision confirmed that Treasury Department regulation at issue was not a reasonable statutory interpretation).

C. Alleged Abuse Is Logically Irrelevant to the Restoration Decision Since Financial Affordability is Determinative

A company whose finances have improved sufficiently to afford a previously terminated plan should have that plan restored to it. *See, e.g.*, Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5158 ("a terminated plan . . . may be restored if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent"); 29 U.S.C. § 1001b(c)(4) (Supp. IV 1986) ("It is hereby declared to be the policy of this title . . . to provide for the transfer of unfunded pension liabilities onto the single employer pension plan termination insurance system only in cases of severe hardship"). LTV has never disputed this proposition.

Conversely, an entity that cannot afford a previously terminated plan cannot have that plan restored to it. To "restore" a plan to an entity that cannot afford it would be a meaningless exercise leading to immediate re-termination. The agency concedes this. It now admits that it did not restore the Republic Retirement Plan — which the agency has never suggested differs in any other way from the three restored plans — because "that Plan did not have enough

money to pay benefits currently due."[20] To permit restoration as a remedy for "abuse" of PBGC policy in instances where a plan must be promptly reterminated would sanction manipulation of the process for the sole purpose of increasing PBGC claims within the bankruptcy to the detriment of all other creditors.[21] PBGC Br. at 37 n.23; *see* U.S. Br. at 24 n.19.

ERISA thus makes financial improvement both a necessary and a sufficient condition for restoration. The agency's asserted abuse policy, even if it could be squared with ERISA and other federal laws, is logically irrelevant to the restoration decision. An agency decision based on a logically irrelevant factor cannot stand: "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *see Overton Park*, 401 U.S. at 416-17.

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20. As noted, see *supra* at 10 n.5, ERISA might well prevent restoration of the three plans now at issue because their assets may have been exhausted since their terminations. LTV has not been advised by the PBGC of the current status of their assets, but benefits have been paid at approximately $26 million per month since January 1987 with no assets being added. LTV estimates that the assets of the J&L Hourly Plan, the largest, were exhausted in December, 1989.

21. In this case, the PBGC's claim in the event of retermination would increase from approximately $2 billion to more than $3 billion as a result of the change in termination date and the 1987 ERISA amendments giving the PBGC a claim for 100% of the unfunded liability. 29 U.S.C. § 1362(b)(7)(A) (West Supp. 1988).

The arbitrary result of basing a determination on abuse is demonstrated by the Solicitor General's rationalization, never advanced by the PBGC, of a sliding scale under which entities with an identical ability to afford plans would be treated differently based on whether one of the entities had adopted a "follow-on plan." U.S. Br. at 24-25. Yet under the statutory scheme, a plan can remain terminated only if a sponsor cannot afford the plan. To use the continuation of terminated status as a reward to an entity that *can* afford its plan is fundamentally contrary to the agency's duty to terminate plans only where necessary. The sliding scale proposition also lays bare the manipulative objective of this restoration notice, and precludes the articulation of a reviewable, rational standard for assessing financial improvement. Such a *post hoc* rationalization demonstrates how arbitrary and imprudent is the agency's version of "abusive" follow-on benefits.

In the present case, the lack of any logical connection between "abusive follow-on plans" and restoration is particularly evident. The interim agreement specifically provided that it would be extinguished, and the parties would return to the bargaining table, if the new programs were struck down. JA 155. LTV had agreed to litigation of the PBGC's appeal from the order approving the labor contract, or to the commencement of a declaratory judgment action, to determine the legality of the CBA benefits. JA 360-361. The PBGC thus had full access to the courts for review and, if appropriate, enforcement of its policy, with the agreement itself promising the most complete form of enforcement. Punitive restoration on this ground was unnecessary and irrational. As a matter of law, the restoration notice based on "abuse" was arbitrary and capricious and the lower courts' judgment on that point should be affirmed.

D. The Agency's Application of its "Abuse" Policy to the Interim Benefits Was Arbitrary and Capricious

The District Court and the Court of Appeals both held that even if the agency's "abuse" policy was within its statutory authority, its application of that policy to the interim benefits was arbitrary and capricious. Pet. App. 17a, 100a. Both the District Court and the Court of Appeals found that the administrative record provided no support for the conclusion that the interim benefits constituted "follow-on" plans.

The agency's failure even to consider the federal policies that led to the interim benefits was coupled with a failure to consider adequately whether the interim benefits even were "follow-on" plans. "Nowhere in the record," the Court of Appeals held, "is there a showing that the PBGC undertook an analysis" of the following differences between the CBA Plans and the terminated plans:

> "(1) none of the new programs under the 1987 CBA Plans are guaranteed by PBGC; (2) benefits under the new Plans are provided through welfare plans, insurance companies or general corporate assets, whereas benefits under the old Plans were provided under a single defined benefit plan; (3) the 1987 CBA Plans have more restrictive age and service eligibility requirements; and (4) the length of service does not necessarily increase the amount of some benefits under the new Plans." Pet. App. 19a.

Both courts also correctly held that the three PBGC opinion letters which the agency put forward to explain why the CBA plans were abusive "follow-on" plans "concerned cases that were 'too factually dissimilar from the instant case to be of substantial assistance here.'" Pet. App. 20a. By its own admission, the agency's opinion letters "are not intended to dispose of particular controversies between private parties," and "are not binding on the public or the courts." PBGC Opinion Letter No. 87-7, July 21, 1987. The three letters put forward here involved cases of voluntary rather

than involuntary terminations. Moreover, in two of the cases employers had proposed a package which specifically contemplated that plan termination would be coupled with new plans that used PBGC funds as an integral part of their financing and resulted in benefits equal or greater than the pretermination level. Not only were the LTV plans terminated involuntarily by the PBGC, "there was no evidence that LTV contemplated the use of PBGC funds in the new Plans or entered into the 1987 CBA Plans in an attempt to assure its employees a high level of benefits while circumventing its obligation to fund the pension plans." Pet. App. 20a. On this ground, therefore, the restoration decision of the PBGC was arbitrary and capricious and the matter must be remanded even if, contrary to our arguments, follow-on arrangements could in some circumstances support restoration.

* * *

In sum, the agency's "abuse" rationale for restoration is baseless. Here, restoration conflicts with the substantial bankruptcy and labor law policies that led directly to the interim benefits. At a minimum, the blatant refusal of the agency to even consider these directly relevant statutory schemes was arbitrary and capricious. Even if the agency may look only to ERISA, its vague abuse policy is fundamentally at odds with that statute, is contrary to all evidence and in any case is logically irrelevant to restoration. Finally, even if one assumes that the agency can use restoration to punish "abusive follow-on plans", the agency failed even to adequately determine whether these were follow-on plans. On any one of these grounds alone, the "abuse" rationale must be rejected.

POINT II

The Agency's Determination of "Financial Improvement" was Arbitrary and Capricious

LTV has never disputed that financial improvement sufficient to afford pension obligations would justify restoration. *See* Pet. App. 21a. But the agency was required to consider in a rational manner

whether the financial condition of LTV Steel had improved enough that it could afford the Plans. In its analysis of this question, the PBGC was required to recognize the fact that LTV Steel is in bankruptcy, and that affordability in these circumstances must take into account LTV Steel's ability to reorganize and to provide equal treatment in a plan of reorganization to claims of equal status. If LTV Steel cannot meet the requirements of equality of treatment in a plan of reorganization, it will be liquidated. In that case, the plans will be reterminated. The PBGC ignored this reality.

The record plainly shows that the agency did not even *consider* the possibility that the Plans, if restored, would have to be reterminated; did not even *consider*, before declaring that LTV's finances had improved, the fact that LTV is in bankruptcy; articulated *no* reviewable standard of financial improvement; and based its financial improvement conclusion on the same data concerning financial conditions that it had used for its termination decision eight months before, and on "fundamental, yet unexplained and unexamined assumptions." Pet. App. 22a. The agency's financial improvement determination failed to meet the most minimal requirements of the "arbitrary and capricious" standard of review of informal adjudication.

A. Failure to Consider Possibility of Retermination

The lower courts examined whether the agency had given *any* consideration to the most obvious question arising from restoration: will it lead to immediate retermination? The agency had not and this failure alone required that the restoration notice be vacated:

> "*We note that nowhere in the administrative record is there any evidence that PBGC assessed the possibility that the Plans would have to be re-terminated.* ERISA contains no special provisions governing retermination; however, the standards would be the same as for an initial termination. If in the near future LTV were once again found unable to adequately fund the Plans, the resulting vacillation in agency policy would lead to uncertainties on the part of the retirees, plan sponsors,

creditors and the government. Such uncertainty is to be avoided where possible. *See New York Council, Ass'n of Civilian Technicians*, 757 F.2d at 508." Pet. App. 25a (emphasis supplied).

In making its restoration decision the agency was required to consider whether it would lead to retermination (or justify its *post hoc* assertions on appeal that such consideration is impossible). ERISA does not intend that pension plans be ping pong balls batted between termination and restoration depending on short term factors. Section 4047 authorizes restoration only when restoration is consistent with the PBGC's duties under Title IV. Under Section 4042(a)(4) the PBGC must involuntarily terminate "as soon as practicable" a plan which has insufficient assets to meet current obligations. 29 U.S.C. § 1342(a) (Supp. IV 1986). It would be senseless to interpret Section 4047 to allow restoration where it is plain that a plan will have insufficient assets to meet current obligations and therefore must be reterminated by the PBGC under ERISA § 4042.

B. Failure to Consider the Consequence of Bankruptcy

The PBGC's financial analysis ignored the fact that LTV Steel could not make contributions to restored pension plans where its contribution obligation arose as a result of pre-petition labor. The agency also ignored the fact that the five month accumulation of cash on which the agency relied in finding "financial improvement" was a result of the protections afforded by Chapter 11. Pet. App. 23a. The agency cannot ignore the *fact* of bankruptcy *and* rationally assess whether LTV Steel's finances have improved.

Contributions owed the plans as a result of benefits earned by pre-petition employment constitute pre-petition debts. *See, e.g., Trustees of the Amalgamated Ins. Fund* v. *McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986) (claim for withdrawal liability that matures post-petition is pre-petition in nature since consideration for liability is pre-petition services); *In re Great Northeastern Lumber & Millwork Corp.*, 64 B.R. 426 (Bankr. E.D. Pa. 1986); *In re Silver Wheel Freightlines, Inc.*, 57 B.R. 476 (Bankr. D. Ore. 1985); *Amalgamated Ins. Fund* v. *William B. Kessler, Inc.*, 55 B.R. 735 (S.D.N.Y. 1985).[22] Absent express congressional instruction or bankruptcy court authorization based on extraordinary circumstances, pre-petition claims may not be paid by a Chapter 11 debtor outside a plan of reorganization. Therefore, analysis of a Chapter 11 debtor's ability to make contributions to a pension plan must take into account not only the legal limitations upon such a debtor's ability to use apparently available assets, but also the debtor's obligation to pay on an equal basis all claims of equal status.[23] The PBGC, which has stated that it deliberately ignored

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22. The observation of the Court of Appeals that such contribution obligations give rise to pre-petition claims in this case, while correct, did not constitute a holding of the Court in the context of this case, and is not encompassed in the questions presented for review by this Court. Appropriate review of this issue — which would have an immense impact on every bankruptcy — would require actual litigation of the status of identified pension contribution claims, development of a full record, and consideration by lower courts before any review in this Court. In fact, this precise issue is now pending in the Bankruptcy Court.

23. The Solicitor General's brief once again conveys an inaccurate analysis of relevant law. U.S. Br. at 22 n.18. It is correct to observe that a guarantee of future benefits is considered compensation earned by a worker at the time the work is performed. Claims for such benefits based on service performed pre-petition are therefore pre-petition claims. The debtor's responsibility under ERISA to fund such benefits may arise after the petition is filed but that does not change the pre-petition nature of the debtor's obligation to its retirees. The Solicitor General confuses this point with the correct precept that the cost of benefits earned by work performed after the bankruptcy petition is filed is a current obligation, like wages.

Priorities are assigned under the Bankruptcy Code to compensation due as a result of labor performed either after the petition was filed or within 180 days prior to the filing. These priorities, which are designed to assist reorganization by ensuring employees that they will be fully compensated for their post-petition service, have no relevance to benefits based on pre-petition service. To obtain administrative status, a claim must meet a two part test. It must arise from a transaction with the debtor-in-possession and it must benefit the debtor-in-possession in the operation of its business. *See In re Jartran, Inc.*, 732 F.2d 584, 587 (7th Cir. 1984); *In re Mammoth*

applicable federal law other than ERISA when reaching its restoration decision, refused to consider the fact, which it had already found, JA 129, that LTV Steel could not fund the pension plans and a plan of reorganization. This implicit recognition that LTV Steel cannot therefore afford the pension plans leaves the PBGC's determination without statutory or factual foundation.

The District Court observed that it "cannot analyze" whether the agency's financial improvement conclusion "is consistent with ERISA since the PBGC has never addressed, formally or informally, the question of what percentage of a Chapter 11 debtor's cash flow should be deemed adequate to fund the full cost of the debtor's minimum funding obligations." Pet. App. 116a n.38. It could not review the agency's analysis of LTV's financial condition because there was in essence nothing to review. Pet. App. 115a-116a. An administrative record so devoid of explanation that judicial review is impossible must be rejected as arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (court must examine agency explanation to determine whether it is based on relevant factors or shows a clear error of judgment).

Mart, Inc., 536 F.2d 950 (1st Cir. 1976); *Trustees of Amalgamated Ins. Fund*, 789 F.2d at 101; *In re Baths Int'l, Inc.*, 31 B.R. 143, 145 (S.D.N.Y. 1983). This test is premised upon two fundamental policies underlying federal bankruptcy law, equality of distribution and rehabilitation of the debtor's business. Claims for pension obligations based on pre-petition service meet neither test.

Here, no more than $12 million of the billions of dollars of unfunded pension benefits at issue are compensation for work performed after the petition was filed or within 180 days prior to filing.

C. Fundamental Gaps in Reasoning

Although these glaring gaps in the administrative record by themselves require a remand to the agency, the conclusion that the agency's "financial improvement" rationale was arbitrary and capricious was also based on additional instances in which the agency completely failed even to *consider* fundamental factors relating to LTV's supposed financial improvements. The agency assumed, without any explanation, that LTV would be able to obtain $600 million of funding waivers from the IRS when the IRS had previously denied LTV's waiver request for 1985 and had revoked its waiver for 1984. Pet. App. 115a. "The record discloses no reason to believe that the IRS, after having denied previous waiver requests, would grant such requests in 1987." Pet. App. 22a. Moreover, the agency assumed, without any explanation, that $50 million savings resulting from concessions in the interim agreement would be retained even though the entire reason for the Union's concessions would be eliminated if the Plans were restored. Pet. App. 22a-23a.[24]

In sum, the agency's "analysis" that LTV Steel's financial condition had improved such that it could afford the pension plans was

24. The agency's *post hoc* explanations for its financial improvement determination, such as its belated shutdown analysis, are entitled to no deference by this Court. "*[P]ost hoc* rationalizations by counsel for agency action are entitled to little deference." *Securities Indus. Ass'n v. Board of Governors of Federal Reserve System*, 468 U.S. 137, 143 (1984); *see Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50; *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc.* 371 U.S. at 168-69.

Moreover, the reviewing court may not make up for deficiencies in the administrative record; "we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Neither can *amici* substitute their financial analyses for that of the agency.

a shambles. The agency's financial improvement rationale is riddled with failures that *each* would require the restoration notice to be vacated: failure to consider the possibility of retermination; failure to consider the fact of bankruptcy; failure to explain the untenable assumptions on which its conclusion depends. The agency's finding of financial improvement was the definition of arbitrary and capricious action.

POINT III

The Lower Court's Discussion of PBGC Procedures Raises No Issue Under Vermont Yankee

The District Court and the Court of Appeals correctly found that the process by which the agency reached its results did not meet the minimum standards necessary to ensure a fair process amenable to review.[25] These findings do not contravene *Vermont Yankee*. That case forbids a court from imposing procedures on an agency beyond those required by the APA or the substantive statute in question. In this case, the APA is silent as to which procedures should be followed in informal adjudication, while ERISA prescribes no procedures applicable to restoration. This Court determined in *Overton Park*, 401 U.S. at 415, that the APA obliged courts in reviewing informal adjudication to engage in a "thorough, probing, in-depth review" of the record. This ruling survived and is consistent with *Vermont Yankee*. To assure a reviewable record, a court may

25. It is unclear that the discussion of PBGC procedures provided a separate basis for decision. At best, we can only guess that this may have been the case. As a result, this is a poor case in which to consider the "novel and important" issue of what procedures may be required in informal adjudication. U.S. Br. at 28 n.25. Affirming a remand to the agency would afford an immediate opportunity to cure the defects in the record, and in all likelihood would ultimately avoid the necessity to confront the issue in this case.

properly call for minimal standards of fair procedure.

The APA was enacted against the backdrop of the common law of informal adjudication, and does not displace it in the absence of an expressly articulated intent to do so. *See Jones* v. *General Motors Corp.*, 856 F.2d 22, 24-25 (4th Cir. 1988) (noting "the principle of interpreting the statute so as to limit the scope of displacement of the common law".)

The common law of informal adjudication has long recognized that courts need to require that certain procedures be followed in order to ensure a record that permits judicial review. In *Overton Park*, for instance, this Court required that the Secretary of Transportation provide a reasoned explanation of his decision, despite the fact that neither the APA nor the statute in question required any type of findings and conclusions. 401 U.S at 420-421. The purpose of such a requirement was to ensure the possibility of "effective judicial review." *Id.* at 420. *See also Dunlop* v. *Bachowski*, 421 U.S. 560, 571 (1975) (Secretary of Labor must provide court and complaining witnesses copies of statement of reasons for not prosecuting action under Labor-Management Reporting and Disclosure Act "to enable the reviewing court intelligently to review the Secretary's determination"); *Independent U.S. Tankers Owners Comm.* v. *Lewis*, 690 F.2d 908, 923 (D.C. Cir. 1982) (requiring notice, comment, and statement of reasons as "necessary means" for conducting review).

The common law of informal adjudication also recognized that certain measures were fundamental to fair process. Informal adjudication reflects a "residual category of procedural entitlement," Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739, 739 n.1 (1976); as such, it represents a non-Constitutional source of authority for imposing certain procedures. This Court has implicitly recognized this fact. In *Bowman Transp.*, at issue was the grant to motor carriers of certificates of public convenience allowing them to transport goods over certain routes. Applicants' interest in such certificates clearly was not a constitutionally protected one, for none could claim to have a "legitimate

claim of entitlement" to a certificate. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Nonetheless, in rejecting a challenge to the procedures employed by the agency in issuing the certificates, the Court noted, "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." *Bowman*, 419 U.S. at 288 n.4.[26] *See also Chicago, Milwaukee, St. Paul and Pacific R.R. Co.* v. *United States*, 585 F.2d 254, 260 (7th Cir. 1978) (post-*Vermont Yankee* case involving no property or liberty interest; court found inadequate notice and opportunity for comment, remanding because "fundamental fairness in administrative proceedings requires notice clearly informing a party of the proposed action and the basis for that action.")[27]

The findings of the District Court and the Court of Appeals were compelled not only by the common law of informal adjudication but also by the courts' statutory obligations, under § 706(2)(A) of the Administrative Procedure Act, to engage in a "thorough, probing, in-depth review" of the record. *Overton Park*, 401 U.S. at

26. The Court goes on in the next sentence of its opinion to discuss instances in which the Due Process Clause also restricts an agency's use of evidence, which may be why the United States in its brief erroneously described *Bowman* as a "due process case." U.S. Br. at 27 n.24. As the discussion in text establishes, that case involved no protected liberty or property interest. If it did, this one does, too. LTV's interest, and that of its creditors, in avoiding government imposition of significant financial liability is at least as weighty an interest as a hope that one might obtain a certificate to do business over a certain route.

27. The common law of informal adjudication also reflects a relative consensus on the procedures necessary to ensure basic fairness. As one commentator has observed, "It would be difficult to imagine even a streamlined adversary system that did not provide an individual with notice, an opportunity to comment, and a statement of reasons before adverse action is taken." Verkuil, 43 U. Chi. L. Rev. at 749. Such widespread agreement serves to cabin judicial discretion.

415. In order to fulfill this obligation, the court was authorized to ensure the existence of a record adequate to permit judicial review of the agency's decision. *Overton Park*, 401 U.S. at 420-421; *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). *Cf.* Scalia, Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345, 354 (noting "two bases of decision which conceptually may be quite distinct: (1) the inadequacy of the agency's procedures; and (2) the inadequacy of the record to support the agency decision"). Here, the agency had "fail[ed] to develop a complete, reviewable record," Pet. App. 123a.

A court exploring an agency's failure to create an adequate record acts reasonably, and indeed responsibly, when it examines the procedural defects that contributed to this failure. As the court said in *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 339 (D.C. Cir. 1989), "[A] district court that remanded a matter for further proceedings without indicating any connection it perceived between an unacceptably opaque agency decision and the procedures from which it arose would, by its silence, disserve every relevant interest, and advance none."[28]

In this case, the lower courts simply set forth suggestions about how an adequate record might be created and basic fair process

28. A court engaged in this task establishes a "performance standard" — that "the agency must produce an administrative record that delineates the path by which it reached its decision" — rather than a "design standard" — that there are "specific procedural steps that must be followed in order to create a reviewable record[.]" *Id.* at 338. Only the latter may implicate this Court's decision in *Vermont Yankee*. *See generally Occidental*, 873 F.2d at 337-339 (reconciling *Vermont Yankee* with *Overton Park*); *see also East Texas Motor Freight Lines* v. *United States*, 593 F.2d 691, 695 n.7 (5th Cir. 1979) (finding that *Vermont Yankee* does not prevent remand for explanation necessary to preserve effective judicial review); S. Breyer, *Regulation and its Reform*, 105-106 (1982) (discussing performance versus design standards).

assured. A statement that identified the standards used by the agency and indicated how they had been applied to the facts of this case would have enabled the court to determine if the agency had acted in a reasoned manner. This is particularly important in light of the fact that the agency restored some but not all of LTV Steel's pension plans. As the District Court noted, "in the absence of ascertainable standards concerning follow-on plans," the agency's distinction among plans is "difficult to understand[.]" Pet. App. 125a n.44. Similarly, the provision of some type of notice of reasons would have provided evidence of rational decision-making by forcing the PBGC to articulate its standards and the way in which they were being applied. Finally, an opportunity to respond would have assured the court that all relevant factors had been put before and considered by the agency. At the same time, the agency was not directed by the court's brief discussion to utilize any specific procedures on remand.

The PBGC makes much of a series of meetings surrounding LTV's application to the Bankruptcy Court for approval of the interim agreement and of correspondence with LTV thereafter, suggesting that these communications were adequate to ensure administrative fairness. Yet the agency does not contest that in its discussions with LTV it never identified financial condition as a factor in its decision, much less set forth the analysis that underlay reliance upon that factor. At no time prior to restoration did the PBGC take the basic step of expressly informing LTV that it proposed to restore LTV Steel's pension obligations pursuant to specific standards that it deemed satisfied in this case. Under such circumstances, the agency's open-ended solicitation of "any additional information [that LTV] might wish to supply," JA 348, hardly afforded LTV the opportunity to respond directly to the PBGC's position that the contemplated action could be based on financial improvement.

In short, the first time that LTV was aware that the PBGC claimed financial improvement justified restoration was when it was informed that restoration had occurred. The agency now claims that

LTV should have been able to piece together its rationale from various communications. Widely accepted notions of fairness demand more, particularly when the business plan before the agency was the same one on which the termination decision was based a few months earlier. LTV was entitled to notice of the asserted improvement of its financial condition.

The APA was not intended to bestow unfettered discretion on agencies. As this Court said in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950):

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

The minimal procedures suggested by the court in this case are thus consistent with the basic principles underlying our system of administrative justice.

CONCLUSION

The decision of the Court of Appeals should be affirmed and the PBGC's notice of restoration should remain vacated.

Dated: January 16, 1990

Respectfully submitted,

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No. 89-390

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. PBGC REASONABLY EXERCISED ITS AUTHORITY UNDER SECTION 4047 OF ERISA IN RESTORING LTV'S PENSION PLANS IN RESPONSE TO FOLLOW-ON ABUSE.

The broad language of section 4047 of ERISA—deftly ignored by virtually all the respondents[1]—controls this case. In section 4047, Congress authorized the PBGC to restore a pension plan "in any such case in which *the corporation* [PBGC] determines such action to be appropriate and consistent with its duties under [Title IV of ERISA]." Under fundamental principles of administrative law, PBGC's exercise of this broad discretionary authority to enforce its policy against abusive follow-on plans must be sustained unless the policy is unreasonable or based on an impermissible construction of the statute. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977). This is especially true when a court is reviewing an agency's understanding of a "very complex statute" like ERISA. *See Young v. Community Nutrition Institute*, 476 U.S. 974, 981 (1986); *Mead Corp. v. Tilley*, 109 S. Ct. 2156, 2162, 2164 (1989).

PBGC's policy is straightforward: an employer may not use the termination insurance program to subsidize ongoing pension arrangements. Abusive follow-on plans negate Title IV's insurable event—plan termination—and eviscerate the benefit limitations (the "coinsurance" feature)[2] built into the statutory scheme, thereby allow-

[1] One respondent, the Official Committee of Equity Security Holders, did comment candidly on the statutory language:

> Congress set no substantive standards for such restoration, or for the procedure to be utilized by the agency other than as articulated in the Administrative Procedure Act . . . .

Equity br. at 7.

[2] Far from being "the invention of a PBGC employee," Wheeling-Pittsburgh br. at 25 n.20, "coinsurance" is a well-known insurance

ing employers to overcome the opposition of employees and unions to termination.

PBGC's policy did not arise as an abstraction, but was born directly from the agency's experience with abusive terminations. It was originally articulated in 1981, in response to attempts by two different employers that sought to invoke PBGC's guarantees while continuing to provide substantially the same benefits as before termination. Pet. App. 159a, 165a. It was reiterated in 1986, when the Wheeling-Pittsburgh Steel Corporation sought to reorganize in bankruptcy by terminating its insured plans (with a $500 million deficiency). As in this case, the USWA dropped its opposition to the termination of the plans when the company agreed to follow-on plans. *See* Pet. App. 174a.[3]

The three opinion letters resulting from these incidents made clear that, although ingenious employers may structure follow-on plans in many ways, the hallmarks of an abusive follow-on plan are the crediting of service under the former plan and the replacement, on an ongoing basis, of substantially all benefits not guaranteed by the PBGC. The letters also warned that, where follow-on plans were established, a pension plan "would not be treated as terminated" and PBGC "would be constrained to exercise its authority under Section 4047" to restore the former plan. Pet. App. 163a-164a, 178a.[4]

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concept. *See* C.A. Williams Jr. and R. Heins, *Risk Management and Insurance* 484 (6th ed. 1989). By forcing the insured to bear part of the loss, coinsurance "discourage[s] overutilization of services by the insured." *Id.* The concept is endorsed in the legislative history of ERISA, which shows that the explicit benefit limitations in the statute were intended to function that way. *See* S. Rep. No. 383, 93d Cong., 1st Sess. 81 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4965.

[3] Thus, LTV is simply wrong when it argues that "[t]here is no evidence—in the record of this case or anywhere else—to suggest that unions are prepared to modify their uniform hostility to plan termination." Br. at 27.

[4] Contrary to the suggestion of some of the respondents (Equity Committee br. at 22; Wheeling-Pittsburgh br. at 7), PBGC's view

PBGC's policy was thus publicized and generally understood, including by LTV and the USWA. *See, e.g.*, AFL-CIO/USWA br. at 12 n.9 (describing effects of the policy).[5] And the parties had ample opportunity to explore the details of PBGC's policy well before the Plans were restored. PBGC's Executive Director and the Manager of PBGC's Actuarial Policy Division presented affidavits at the bankruptcy court hearing on LTV's application for approval to fund the follow-on plans, and were personally available for cross-examination at that time. LTV, however, chose not to inquire further about the substance or application of PBGC's policy. JA 226-237.

The only restriction Congress placed on PBGC's restoration authority under section 4047 was that PBGC exercise its discretion "consistent with its duties" under Title IV. 29 U.S.C. § 1347. LTV's assertion that follow-on abuse is "logically irrelevant" because "ERISA . . . makes financial improvement both a necessary and sufficient condition for restoration" (br. at 33), is therefore meritless. *See also* Steel Creditors br. at 13 (even if follow-on plans are illegal, they may not be a basis for restoration). Nothing in ERISA so limits the plain language of section 4047, and PBGC has determined that follow-on abuse alone is sufficient, at least where, as here,

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in these cases did not turn on any assumption that the employers were solvent. In one of the 1981 cases, the PBGC noted explicitly that the sponsor "may have had little, if any net worth . . . ." Pet. App. 160a. In the Wheeling-Pittsburgh case, the employer was in bankruptcy. *See* JA 228.

[5] For example, the president of the United Autoworkers Union wrote to his U.S. staff on December 8, 1981:

> One such proposal is to terminate an existing plan, on the theory that the workers involved can be protected by a combination of government guaranteed benefits, and negotiating a new pension plan which will provide any non-guaranteed benefits. Aside from any other objections to that type of proposal, *the government agencies involved have made it clear that they will not approve such a replacement scheme.*

Pet. App. 184a (emphasis added).

restoration would not be a futile act.[6] In such circumstances, restoration is plainly "appropriate and consistent" with PBGC's duties under Title IV.[7]

PBGC's duties under Title IV are to: (1) "encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants"; (2) "provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries"; and (3) "maintain premiums established by the corporation

[6] Wholly apart from LTV's improved financial circumstances, each of the Plans themselves had sufficient assets, even without further contributions, to pay benefits for several years. *See* AR 1153. Moreover, as PBGC informed LTV, restoration meant that the company was again legally obligated to make contributions to the Plans. Pet. App. 183a.

By contrast, PBGC did not restore the one LTV Steel plan (Republic Salaried) that could not pay currently due benefits. *See* JA 318. *See also* n.17, *infra*. Another reason for not restoring that plan was that PBGC expected to recover 100 percent of the plan's asset insufficiency. JA 318. Contrary to the suggestion in some of the opposing briefs, this does not show that PBGC was concerned only about its own interest. Rather, if PBGC recovered 100 percent of the insufficiency, no follow-on abuse would occur with respect to that plan because there would be no PBGC subsidy of the ongoing benefit package.

[7] Equally meritless is Wheeling-Pittsburgh's argument that PBGC's authority under section 4047, as originally enacted, could only be used to restore plans involuntarily terminated by PBGC, and that Congress therefore could not have intended PBGC to use this authority to remedy abuse. Br. at 13-16. The reference in the original version of section 4047 to plans "terminated under section 4042," on which this argument relies, encompassed the termination of *all underfunded* plans, without regard to whether the termination was initiated voluntarily by the employer or involuntarily by the PBGC. *See* 29 U.S.C. § 1341(c) (1982) (requiring PBGC to commence proceedings under section 4042 upon determining that plan is underfunded). Thus, when Congress amended section 4041 in 1986 to permit the termination of an underfunded plan without resort to section 4042, section 4047 was also amended, so that PBGC's restoration authority would continue to encompass all underfunded terminations. 29 U.S.C. § 1341(c) (Supp. IV 1986); 29 U.S.C. § 1347 (Supp. IV 1986). *See* PBGC br. at 22 n.15.

under section 1306 of this title at the lowest level consistent with carrying out the obligations of this subchapter." 29 U.S.C. § 1302(a). By effectuating ERISA's express purpose of discouraging terminations, *Nachman Corp. v. PBGC*, 446 U.S. 359, 381-82 (1980), PBGC's policy against abusive follow-on plans implements each of PBGC's duties under Title IV.[8] It encourages the continuation of private pension plans by forcing employees, unions and employers to confront the full consequences of termination. By deterring abusive terminations, it helps provide for the timely and uninterrupted payment of benefits to participants and beneficiaries. And by discouraging such terminations, thereby limiting PBGC's losses, it keeps premiums "at the lowest level" consistent with PBGC's other obligations. Indeed, by keeping premiums low, PBGC encourages the maintenance of pension plans by other employers.[9]

PBGC recognizes, of course, that enforcement of its policy may result in some participants and beneficiaries losing the opportunity to obtain benefits in excess of those guaranteed by Congress. But PBGC was entitled to balance this risk against the other positive consequences of its policy and give greater weight to the protection of the system as a whole. *See Chevron*, 467 U.S. at 865-66. *See also SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). Moreover, because the whole purpose of PBGC's policy is to deter unnecessary terminations, the total

[8] The union *amici*'s argument that a follow-on plan does not increase PBGC's financial burden in a particular case therefore misses the point. Permitting follow-on plans will lead to terminations in other cases, and these additional terminations will indisputably increase PBGC's financial burden.

[9] PBGC has noted the competitive pressures created when one employer reaps a government subsidy for its pension plan, not because the agency views itself as the "guardian of 'competitive balance' in the steel industry" (Wheeling-Pittsburgh br. at 25), but because a cost advantage arising from an artificial termination by one company will encourage its competitors to follow suit, thereby increasing the cost of the insurance program to the remaining premium payers.

number of individuals adversely affected by the policy will be limited.[10]

Respondents are simply wrong in arguing that PBGC's policy conflicts with ERISA's "bedrock purpose" of ensuring payment of full pension benefits. *E.g.*, LTV br. at 23-26; LTV Bank Group br. at 36. Title IV was never intended to guarantee full benefits after plan termination. To the contrary, Congress expressly limited the benefits PBGC may pay when an underfunded plan terminates "because [Title IV] insurance is not intended as a full replacement of a pension plan, but rather as covering the basic retirement benefits provided under it." S. Rep. No. 383 at 81, *reprinted in* 1974 U.S. Code Cong. & Admin, News at 4965. Moreover, while ERISA was generally designed to protect employee benefits, it is perfectly reasonable for PBGC to conclude that that goal is best met under Title IV by ensuring the continued availability of a fiscally sound pension insurance program to operate as a safety net when private arrangements fail. *See Nachman*, 446 U.S. at 374.[11]

PBGC's policy is not inconsistent with the position the agency took in *Murphy v. Heppenstall*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982). In *Heppenstall*, where retirees were seeking contract damages from their employer for the difference between their guaranteed benefits and those benefits that had *vested* (i.e., been earned) *before* termination, PBGC argued, and the court held, only that ERISA did not preempt the retirees' action for those vested benefits. *Cf. Nachman*, 446 U.S. at 374 (Congress sought to protect "vested" benefits). *Heppenstall* did not involve the accrual of additional benefits under an *ongoing* arrangement that effectively continued the plan as if no termination had occurred.

[10] Indeed, in this case, restoration results in the reinstatement of full benefits for all of the participants in the LTV Steel Plans, at the same time that it provides protection for the system as a whole.

[11] The importance of this objective was recently highlighted in the President's 1991 budget submission to Congress, which described the PBGC insurance program as one of the "hidden PACMEN" "waiting to spring forward and consume another line of resource dots in the budget maze." Budget of the United States Government, Fiscal Year 1991 at 15, 253-54 (discussion of PBGC).

Similarly, neither section 4049 of ERISA, 29 U.S.C. § 1349 (Supp. IV 1986), nor section 4022(c), 29 U.S.C. § 1322(c) (Supp. V 1987), enacted in 1987 to replace section 4049, authorizes the continued accrual of benefits based on past service or permits participants to qualify for benefits based on events occurring after termination. Section 4049, displacing the *Heppenstall* concept, established a procedure for the appointment of a trustee after plan termination to collect from the employer and distribute to participants a specified percentage of the benefits earned prior to termination but not guaranteed by PBGC. Section 4022(c) authorizes the PBGC itself to collect both nonguaranteed and guaranteed benefits, and to distribute at least a portion of the nonguaranteed benefits to participants.[12] Far from being inconsistent

[12] The statute thus provides for the payment of at least a portion of the nonguaranteed benefits earned prior to the date of termination. And PBGC's policy does not preclude the establishment of a new plan after termination which provides benefits solely on the basis of employees' post-termination service. But PBGC's policy is violated by the continued accrual of benefits based on past service and the awarding of benefits under the old plan based on events occurring after termination. For example, when an employee with 25 years of service at the date of termination becomes eligible for a full "30 and out" pension with only 5 more years of service under the follow-on plan, the old plan has effectively continued. Similarly, a follow-on plan might provide for "shutdown benefits" based on service under the old plan in the event of a shutdown occurring after termination. In each case, the amount of benefits payable from the follow-on plan is keyed to the amount that would have been payable from the terminated plan, but the follow-on plan pays only the difference between the latter amount and the amount of the employee's guaranteed benefit from PBGC. And where, as here, these objectionable features are coupled with the replacement of virtually all nonguaranteed benefits and benefit accruals based on post-termination service, all aspects of the arrangement violate PBGC's policy, because the terminated plan is then replicated in its entirety.

with PBGC's policy (LTV br. at 25-26; AFL-CIO/USWA br. at 16-17), these provisions plainly suggest that to the extent Congress intended participants to recover vested benefits beyond those guaranteed by PBGC, it provided for them directly.[13]

Lacking support in the language, purposes or original legislative history of ERISA, respondents—like the courts below—place great weight on legislative materials created three months *after* the agency restoration decision at issue in this case. In December 1987, Congress failed to enact a proposal by the House Ways and Means Committee that would have proscribed any "arrangement under which retirement benefits are provided" for five years after plan termination. Wheeling-Pittsburgh br. at 23 n.17. At best, this subsequent congressional inaction is ambiguous. As LTV itself acknowledges (br. at 30), there were *two* proposals pending before Congress. PBGC's proposal would have proscribed only those retirement programs "which, in whole or in part, provide substantially similar benefits within five years after termination . . . ." *See* AFL-CIO/USWA br. at 22. The Ways and Means Committee did not adopt PBGC's proposal, but instead proposed the more drastic prohibition quoted above. Congress enacted neither.

Under these circumstances, no clear inference about Congress's intent can be drawn. Indeed, Congress's failure to enact any changes in this area, when it was well aware of the restoration of the LTV Plans (*see* PBGC br. at 25), could easily indicate approval of PBGC's policy. *See, e.g., Young v. Community Nutrition Institute*, 476 U.S. at 983; *United States v. Wise*, 370 U.S. 405, 411 (1962).[14]

[13] Contrary to LTV's current argument (LTV br. at 31 n.19), section 4049 recoveries, even when coupled with a future-service defined contribution plan, plainly do not achieve the same degree of benefit replacement as LTV's follow-on plans. *See* n.12, *supra*. Here, in fact, both LTV and the USWA rejected PBGC's proposal that they adopt precisely such a package in lieu of the follow-on plans. JA 262-67.

Contrary to the arguments of the AFL-CIO/USWA (br. at 18-21), the 1986 SEPPAA amendments do not eliminate the need for PBGC's policy. To be sure, SEPPAA's imposition of a distress requirement made it more difficult for an employer to terminate an underfunded pension plan, *see* 29 U.S.C. § 1341(c)(2)(B) (Supp. IV 1986), but an employer that obtains a bankruptcy court order could still terminate. And SEPPAA did not reduce the powerful incentive for employers to dump their pension liabilities on PBGC.[15] Although SEPPAA increased the employer's liability to PBGC, that liability was still generally limited to 75 percent of guaranteed benefits. 29 U.S.C. § 1362(b) (Supp. IV 1986). A discharge in bankruptcy typically permits the employer to eliminate even that liability for much less than 100 cents on the dollar.[16]

Moreover, PBGC's follow-on policy is intended not only to *discourage* plan termination, but to *encourage* better funding of pension plans. *See* PBGC Pet. at 16 & n.14.

[14] The cases cited by LTV (br. at 32) and the Parent Creditors' Committee (br. at 28-29) in an attempt to give meaning to this inaction either contradict their assertions or are inapposite. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) *and Atkins v. Rivera*, 477 U.S. 154, 166 n.10 (1986) (history of bills *actually enacted*); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) *and Bradley v. School Board of City of Richmond*, 416 U.S. 696, 716 n.23 (1974) (contemporaneous legislative history); *Bowsher v. Merck & Co.*, 460 U.S. 824, 837 n.12 (1983) (subsequent legislative inaction, examined to determine whether agency's position had been consistent, "not conclusive" with respect to interpretation of a prior enactment).

[15] Indeed, as the district court noted, LTV has conceded that this was "one of the principal goals" of its filing for bankruptcy reorganization. Pet. App. 101a.

[16] The PPA amendments, enacted after the restoration in this case, likewise do not eliminate the potential for abusive terminations. *See* PBGC Reply to Opp. Cert. at 2.

Full funding eliminates any incentive to terminate, because the employer has no liabilities to dump on PBGC. And where underfunded terminations nevertheless occur, the impact on the insurance program will be less if unions and employees have been motivated to insist on better funding.

In any event, this case demonstrates a means of circumventing the distress requirement for terminations. By failing to make required contributions to its plan or by other means, an employer may be able to cause the plan to run out of money entirely, at which point PBGC is statutorily required to terminate it. 29 U.S.C. § 1342(a). (This in fact happened with one of LTV Steel's plans. JA 122.)[17] Even if the plan still has assets remaining, its deteriorating financial condition could pose the risk of large losses to the insurance program, making termination the prudent course for the PBGC. *See* 29 U.S.C. § 1342(a). Once the plan is safely terminated and the liabilities shifted to PBGC, the employer could then establish follow-on plans. This, of course, is just what LTV did here.[18]

[17] The court of appeals' statements regarding the bankruptcy priority of pension contributions enhance the danger that reorganizing employers will cease making contributions to their pension plans. *See infra* at 15-17. Here, moreover, the Republic Salaried Plan was so severely underfunded that even if *all* minimum funding contributions had been made, the plan still would have had insufficient assets to pay benefits as they became due. *See* JA 318. Thus, contrary to LTV's assertions (br. at 4), PBGC's decision to terminate this plan did not reflect any view as to the priority of the contribution liability, but simply fulfilled PBGC's statutory obligations.

[18] The distinction between voluntary and involuntary terminations, urged in an attempt to distinguish PBGC's prior opinion letters (LTV br. at 35-36), therefore has little practical import. The possibilities for abuse, and the rationale for opposing follow-on plans, are the same in either case. As the judge in the Wheeling-Pittsburgh case pointed out in comparing that case to the LTV case, "The difference is a matter of drama rather than substance." *USWA v. PBGC (In re Wheeling-Pittsburgh Steel Corp.)*, No. 85-793, slip op. at 25 (Bankr. W.D. Pa. June 30, 1989).

The remaining challenges to PBGC's follow-on policy center on the wisdom of PBGC's policy, rather than the permissibility of the agency's interpretation under section 4047. *Cf. Chevron*, 467 U.S. at 866. For example, the AFL-CIO and USWA argue that PBGC's follow-on policy may actually increase the incentives for companies to terminate by reducing the cost of post-termination retirement plans. Br. at 23. As the unions themselves point out, however, if follow-on plans are "remov[ed] from the bargaining table" as a result of PBGC's policy, employers are likely to face employee and union demands for concessions elsewhere, perhaps in higher wages or other kinds of benefits. Br. at 24. The same *amici* also criticize the PBGC for assuming that union or employee resistance "will overcome an employer's economic self-interest in termination." Br. at 23.[19] But PBGC's experience has been that employees are less likely to resist, and employers are more likely to terminate, if follow-on plans are permitted.[20] The responsibility for assessing the wisdom of such policy choices lies with the "agency charged with the administration of the statute in light of everyday realities," not with private constituencies or the courts. *Chevron*, 467 U.S. at 866.

[19] This argument is refuted by the facts of this case: the USWA successfully prevented LTV from terminating its Plans in a distress termination. *See* JA 241-42; 29 U.S.C. § 1341(a)(3). And after the Plans were terminated involuntarily, the USWA persuaded LTV to maintain a vigorous defense of its expenditures for the follow-on plans, even at the risk of restoration.

[20] Pension benefits are not fungible with other benefits, and no "replacement" package other than follow-on plans is likely to be nearly as satisfactory to employers and employees as the old pension plan. Thus, PBGC has reasonably concluded that taking follow-on plans "from the bargaining table" will create strong additional disincentives to termination that more than offset the hypothetical risks suggested by *amici*. Employers will face extreme pressure to keep pension plans adequately funded because employees will stand to lose substantial benefits if plans are terminated—voluntarily or involuntarily. PBGC's experienced judgment on this complex subject is entitled to considerable deference. *See Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 125 (1985).

In this case, PBGC's policy must be sustained because it is a reasonable policy choice consistent with the broad authority granted by Congress. *Young v. Community Nutrition Institute*, 476 U.S. at 981; *Chenery*, 332 U.S. at 207-09.[21]

II. PBGC REASONABLY DETERMINED THAT LTV'S CHANGED FINANCIAL CIRCUMSTANCES ALSO JUSTIFIED RESTORATION.

PBGC also determined restoration to be "appropriate and consistent with its duties" because LTV's financial condition had improved, eliminating the financial reasons for PBGC's original termination decision. *See* PBGC br. at 11-13, 34. Because Congress has specifically directed PBGC to encourage the continuation and maintenance of pension plans, 29 U.S.C. § 1302(a)(1), and to limit terminations to cases of "severe hardship," 29 U.S.C. § 1001b(b) (Supp. IV 1986), it was perfectly reasonable for PBGC to conclude that once the financial factors that led the agency to terminate the Plans had ceased to exist, termination was no longer appropriate or consistent with the agency's duties. *See* PBGC br. at 32-25. That is particularly true where, as here, PBGC also found that LTV could afford to fund the Plans, at least for the immediate future. JA 345.

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[21] The Parent Creditors' Committee (br. at 43-47) and the LTV Bank Group (br. at 18-27) argue that PBGC was required to obtain a court order before restoring the Plans. This argument, however, was rejected by the courts below (Pet. App. 85a-90a; *see* Pet. App. 27a), and may not be considered here because neither party filed a cross-petition for certiorari. *See TWA v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).

Their argument is baseless in any event. The plain language of section 4047 authorizes PBGC to restore a previously terminated plan by direct action, such as by transferring the plan's assets and liabilities back to the employer. 29 U.S.C. § 1347. If Congress had intended to require application to a court, it surely could have so provided in the statute, as it did elsewhere in Title IV. *See, e.g.*, 29 U.S.C. §§ 1341(c)(2)(B)(ii), 1342(c).

Ignoring PBGC's standard, the court of appeals held that an improvement in financial circumstances was not an adequate basis for restoration unless the agency could also prove that the company had the "long-term" ability to fund the plans in question. In doing so, the court invented a legal standard with no statutory basis, thus interfering with precisely "the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process." *Chenery*, 332 U.S. at 209. *See* PBGC br. at 34-37.[22]

Respondents make no serious attempt to defend the court of appeals' long-term-ability-to-fund standard, but instead emphasize yet a third standard, arguing that PBGC was required to consider whether the Plans could be reterminated by LTV under the distress tests set forth in section 4041(c)(2)(B), 29 U.S.C. § 1341(c)(2)(B). However, because this was not a proceeding to terminate a plan, that test was not relevant. In addition, the original termination was not based on any finding that the distress tests were satisfied. There simply is no statutory or logical basis for imposing on PBGC, in making a restoration decision, the burden of proving that LTV does *not* satisfy the distress tests.

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[22] Moreover, imposition of such a requirement would lead to absurd results. Here, for example, one of the factors central to PBGC's decision to terminate the Plans was the risk of shutdown liabilities. JA 138. The elimination of this risk was likewise central to the agency's decision to restore. JA 255-56 (testimony of LTV official in July 1987 that no shutdowns would occur), JA 316 (PBGC consideration of this testimony). Now, however, LTV claims that all of the plant shutdowns that PBGC anticipated in deciding to terminate the Plans had already occurred before the termination decision was made. Even if this were true, it would be all the more reason for PBGC to restore immediately. If PBGC learns that its decision to termination a plan was based on a factual misunderstanding, surely the proper course for PBGC would be "to take such action as may be necessary to restore the plan to its pretermination status," ERISA § 4047, thereby restoring full benefits to the employees and retirees. Under the court of appeals' decision, however, even in such a case PBGC would be prohibited from restoring the plan unless and until PBGC could prove that the employer had the "long-term" ability to fund it. Pet. App. 22a, 24a.

LTV, moreover, could not obtain a distress termination without first bargaining with the union. 29 U.S.C. § 1341(a)(3). It remains to be seen whether, in the absence of follow-on plans, the union would agree to termination. Indeed, even if the company can convince the union that it cannot afford the Plans in the context of its current wage and benefit package, the union might prefer to make concessions in other areas to permit the Plans to continue. And if the union ultimately were to agree to termination, LTV would still have to prove to the bankruptcy court that the only alternative to termination would be for each and every one of LTV's 66 reorganizing controlled group members to liquidate. 29 U.S.C. § 1341(c)(2)(B)(ii); 11 U.S.C. § 1113.[23] Consideration of the distress criteria by PBGC therefore was not required, would have been entirely speculative, and was wholly irrelevant to a restoration decision.[24]

Respondents also seek to attack the factual underpinnings for PBGC's assessment of LTV's short-term ability to afford the Plans, but PBGC's views are both reasonable and entitled to deference. For example, PBGC was well situated to project that upon restoration, LTV could obtain a waiver of its 1984-86 funding obligation: the pertinent statutory provision specifically requires IRS to consult with PBGC before granting a waiver. 26 U.S.C. § 412(f)(3)(A), (B). Moreover, IRS had explicitly "reserved the right to consider at a future time

[23] Moreover, LTV's dozens of non-bankrupt members would be required to make a similar showing to PBGC. 29 U.S.C. § 1341(c)(2)(B)(iii).

[24] Even if there were *now* some chance that the Plans may reterminate at a future date, that would hardly mean that restoration was inappropriate more than two years ago, in 1987. Indeed, from the point of view of plan participants (whose interests, respondents assert, are paramount) putting off termination for as long as possible was surely desirable to permit additional accruals of and eligibility for benefits. *See* AFL-CIO/USWA br. at 12 n.9 (discussing the hardship suffered by an employee whose plan terminates one day before he would have become eligible to retire under the "30 and out" program).

. . . the [requested] waivers . . . if a satisfactory settlement is reached with the PBGC." AR 708. It was also reasonable for PBGC to project that labor concessions associated with the follow-on plans would not be withdrawn upon restoration, since the benefits available upon restoration would be those which the follow-on plans sought to replace.[25]

Finally, PBGC was not unreasonable in assuming that LTV could fund the Plans from its considerable cash flow, since its annual contribution would be classified as an administrative expense. Contrary to the conclusion of the court of appeals and the arguments of the respondents, every court that has addressed the issue has concluded that contributions to an ongoing pension plan are "actual, necessary costs and expenses of preserving the estate," 11 U.S.C. § 503(b)(1), entitled to administrative expense priority (the highest unsecured priority) under 11 U.S.C. § 507(a)(1). *E.g., In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983); *Columbia Packing Co. v. PBGC*, 81 Bankr. 205 (D. Mass. 1988); *In re Robinson Truck Line, Inc.*, 47 Bankr. 631, 637-38 (Bankr. N.D. Miss. 1985); *In re Bollinger Corp.*, No. 76-282, slip op. at 3-4 (Bankr. W.D. Pa. Jan. 30, 1981). These courts have recognized that ongoing contributions to a pension plan are best viewed as a current cost of doing business, since the plan is useful in attracting and retaining a workforce and the contributions are required by law for maintenance of the plan. *Cf. Alabama Power Co. v. Davis*, 431 U.S. 581, 592 (1977) ("Funding a pension program is a current cost of employing potential pension recipients, as are wages.").[26]

[25] Several of the respondents also complain that PBGC should have waited for LTV to issue its 7-year business plan. Steel Creditors br. at 22 n.7; LTV br. at 12. Notably, however, not one of them claims that this new business plan would have altered PBGC's determination. Nor would it have. To the contrary, LTV's financial condition continued to improve dramatically. *See amicus* br. of Armco, *et al.* at 20.

[26] The cases cited by the Steel Creditors (br. at 35) that require a "transaction with the debtor-in-possession" are not incon-

Administrative expenses of this kind do not have to await a plan of reorganization, but may be paid when due in the ordinary course of business. *See* 11 U.S.C. § 503(a); 3 *Collier on Bankruptcy* ¶ 503.01, at 503.08 (15th ed. 1989). Thus, contrary to the court of appeals' belief, pension plans can and should be funded by debtors-in-possession in reorganization under Chapter 11.[27]

The cases respondents cite to the contrary, such as *Trustees of Amalgamated Insurance Fund v. McFarlin's Inc.*, 789 F.2d 98 (2d Cir. 1986), are inapposite. They involve the "withdrawal liability" owed by an employer when it withdraws from a multiemployer pension plan (as by going out of business or by going non-union). *See generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984); 29 U.S.C. §§ 1381-1453. In fact, two of the withdrawal liability cases cited by respondents acknowledge that ongoing contributions are entitled to administrative expense priority. *Amalgamated Insur. Fund v. William B. Kessler, Inc.*, 55 Bankr. 735, 738-40 (S.D.N.Y. 1985); *In re Silver Wheel Freightlines, Inc.*, 57 Bankr. 476, 477 (Bankr. D. Ore. 1985).

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sistent. An ongoing plan *is*, of course, maintained by the debtor-in-possession, and nothing more is required for administrative expense priority. *Cf. Reading Co. v. Brown*, 391 U.S. 471 (1968) (tort liability); *Wall Tube & Metal Products Co. v. Tennessee*, 831 F.2d 118 (6th Cir. 1987) (environmental liability).

[27] The opposing parties argue that the portion of the contributions attributable to so-called "past-service" liabilities cannot be an "actual and necessary cost of preserving the estate" because that portion allegedly is paid in consideration of the employees' past service to the company. That is wrong, as the court in *Columbia Packing* explained:

> [T]he contribution is owed to the pension fund rather than the employees themselves. The past service liability cost is more properly viewed as an actuarial unit of measure for determining the employer's current periodic contribution than as compensation for work performed before the inception of the plan.

81 Bankr. at 209. *Accord Pacific Far East Line*, 713 F.2d at 479.

The disingenuousness of respondents' argument that regular contributions to the Plans could be paid only as part of a distribution to all creditors is revealed by the fact that LTV sought and obtained approval from the bankruptcy court to fund the follow-on plans on an ongoing basis. JA 150. A large portion of the follow-on benefits, of course, cover the same past-service liabilities that the opposing parties now say cannot be paid as administrative expenses. The restored Plans could similarly be funded as administrative expenses.

III. PBGC WAS NOT REQUIRED TO CONSIDER GENERAL POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

The unique language of section 4047 directs PBGC to base its restoration decision on what is "appropriate and consistent with its duties under [Title IV]." 29 U.S.C. § 1347. Although respondents discuss bankruptcy and labor law at length, they never show how consideration of these bodies of law would have fulfilled PBGC's Title IV duties. Nor do they identify any specific *provision* of bankruptcy or labor law that conflicts with PBGC's restoration action. Rather, as LTV distills it, respondents' argument is that the follow-on plans in this case are "the direct product of these two major federal policies." LTV br. at 22. This is not enough to override PBGC's duty to apply the express statutory criteria for the exercise of its restoration authority.[28]

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[28] In *Guidry v. Sheet Metal Workers National Pension Fund*, 58 U.S.L.W. 4131 (U.S. Jan. 17, 1990), this Court rejected the argument—relied on by the court of appeals in this case (Pet. App. 16a)—that 29 U.S.C. § 1144(d) required a specific ERISA provision to yield to a more general provision or goal of another statute. The Court said, "We do not believe . . . that the LMRDA will be modified, impaired, or superseded by our refusal to allow ERISA pension plans to be used to effectuate the remedial goals of the LMRDA." 58 U.S.L.W. at 4134. Similarly, neither the Bankruptcy Code nor federal labor law will be modified, impaired, or superseded by refusing to allow PBGC insurance funds to be abused. In any event, as noted in our opening brief (at 40 n.25), 29 U.S.C. § 1144(d) by its terms does not apply to this Title IV case.

No one disputes that federal labor law encourages collective bargaining as a means of resolving labor-management differences. But it hardly follows that a federal agency is required to accept an otherwise impermissible arrangement just because a company and a union agree to it in collective bargaining. Surely no one would seriously maintain this argument if LTV and the USWA had entered into an agreement discriminating against some employees on the basis of race or sex, or providing that the company would pay increased wages out of money saved by disregarding applicable safety or environmental laws. *See UMW v. Pennington*, 381 U.S. 657, 665 (1965) ("because they must bargain does not mean that the agreement reached may disregard other law").

Respondents argue that PBGC should have given more weight to the bankruptcy policy favoring rehabilitation, but like other agencies enforcing antitrust, environmental, or anti-discrimination statutes, PBGC has no obligation to bend its regulatory scheme to assist debtors' reorganization efforts. More precisely, a company receiving more than $2 billion in insurance guarantees from a federal trust fund is not exempt from the well-established rules of that agency merely because it is in bankruptcy.[29]

Because this case does not involve even a potential conflict between statutory provisions, the parties' insistent reliance on *NLRB v. Bildisco & Bildisco*, 465 U.S.

[29] The Steel Creditors argue (br. at 28) that PBGC had an obligation to compare what creditors would have received in a plan of reorganization involving restored plans with what they would receive in a liquidation where the plans were reterminated. But if, after restoration, the parties are convinced that retermination is essential to avoid liquidation, and LTV can convince the union to agree to termination, the parties will be able to invoke the jurisdiction of "the appropriate court" to determine that question. 29 U.S.C. § 1341(c)(2)(B)(ii). For PBGC to have speculated about the outcome of this process at the time of its restoration decision would have been inappropriate. *See* discussion at 14, *supra*.

513 (1984), is misplaced. *Bildisco*, unlike this case, involved a direct conflict between express provisions of two statutes. Section 365(a) of the Bankruptcy Code, which authorized a debtor to reject executory contracts, conflicted with sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, which made it an unfair labor practice to change a labor agreement unilaterally. In order to reconcile these conflicting statutes, this Court examined their respective policies, and concluded that "Congress intended" that a debtor should be allowed to reject a labor agreement, 465 U.S. at 522-23, but only upon a higher showing than the normal "business judgment" rule, *id.* at 526.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962), is similarly inapposite. In *Burlington*, this Court held that where a secondary boycott disrupted trucking service in an area, and the boycott was "unlawful" under the statute administered by the NLRB, the Interstate Commerce Commission should not have granted a certification for service by an additional carrier without at least considering the possibility of issuing a "cease and desist" order expressly authorized under its own statute. Here, no violation of another statute was involved, and PBGC's action certainly did not trench on the jurisdiction of another agency.

Moreover, although PBGC's organic statute did not require it to do so, the agency repeatedly attempted to block the follow-on plans within the bankruptcy process. As respondents fondly recount, the agency's efforts were rejected no less than eight times. However, each of these was based on procedural grounds—not once did any court address the merits of the follow-on policy. Thus, when LTV proceeded to implement the follow-on plans during that litigation, the PBGC acted on its statutory authority to restore the plans, pursuant to the bankruptcy court's suggestion that PBGC should pursue its own administrative remedies rather than present its objections in court. *See* JA 261. The agency was not required to allow the insurance program to be abused, per-

haps for years, while it pursued an appeal from this last rejection.[30]

Finally, the *amicus* brief for the State of Ohio confirms the absurd implications of the court of appeals' holding. Ohio suggests that in deciding whether to restore the Plans, PBGC also should have considered the impact on Ohio's tax revenues and on the state's unemployment compensation and workers' compensation programs. Ohio br. at 11-12. Requiring federal agencies to consider every tangentially related "policy" or conceivable impact before taking any action could paralyze administrative decisionmaking. This Court should make it clear that such intrusive judicial review will not be countenanced.

CONCLUSION

The decision of the court of appeals should be reversed and PBGC's restoration of the Plans should be enforced.

Respectfully submitted,

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Dated: February 13, 1990

[30] Indeed, although several respondents criticize PBGC for its failure to pursue its appeal from the bankruptcy court's refusal to consider the merits of the agency's position, they fail to disclose that LTV had moved to dismiss PBGC's appeal as interlocutory.

(13)

No. 89-390

In the Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION, PETITIONER

v.

LTV CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Section 4047 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1347 (1982 & Supp. V 1987), authorizes the Pension Benefit Guaranty Corporation (PBGC) to "restore" a terminated pension plan to its pre-termination status, thus transferring the assets and liabilities of the plan back to the sponsoring employer, "in any such case in which the corporation determines such action to be appropriate and consistent with its duties." In this case, the PBGC restored pension plans sponsored by LTV Steel Company in part because LTV Steel, subsequent to the termination, adopted "follow-on" plans to provide benefits not covered by the termination insurance program. The PBGC determined that LTV Steel had abused the termination insurance program by shifting its liabilities to the PBGC while, in effect, continuing to operate the plans. The Second Circuit, which concluded that the PBGC had "focused inordinately on ERISA" (Pet. App. 17a) and had failed to take into account policies underlying bankruptcy and other labor laws, held, inter alia, that the PBGC erred in basing its restoration decision on LTV Steel's adoption of follow-on plans.

The United States will address the following question:

May the PBGC, in deciding whether to restore a terminated plan, take into consideration the sponsoring employer's adoption of an abusive follow-on plan?

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INTEREST OF THE UNITED STATES

This case involves the termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly owned government corporation that has independent litigating authority (29 U.S.C. 1302(b)(1)), is primarily responsible for operating the termination insurance program. But the Department of Labor and the Treasury Department also have substantial interests in the operation of the program. Under 29 U.S.C. 1132(a)(2), the Secretary of Labor may bring suit to enforce the terms of employee benefit plans. See also 29 U.S.C. 1132(a)(5). Under 29

U.S.C. 1132(b), the Secretary of the Treasury and the Secretary of Labor have joint responsibility with respect to delinquent contribution actions against employers that have not fulfilled the minimum funding requirements established by ERISA. And under 26 U.S.C. 4971 (1982 & Supp. V 1987), the Secretary of the Treasury is responsible for imposing excise taxes on employers that do not fund their pension plans in accordance with ERISA's requirements.

In addition, the court of appeals held that since respondent LTV Corporation was seeking to reorganize, the PBGC should have tempered its efforts to protect the termination insurance fund in light of the policies underlying the Bankruptcy Code. That holding is of particular concern to the Federal Deposit Insurance Corporation, which frequently seeks to collect the assets of failed banks for the benefit of the federal deposit insurance fund.

STATEMENT

1. This case arises from the termination and subsequent restoration of three underfunded pension plans maintained by respondent LTV Steel Company. Defined benefit pension plans—the type involved here—are insured by petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly owned government corporation established by Title IV of ERISA. See 29 U.S.C. 1302.[1] Although Title I of ERISA requires employers to make regular contributions to defined benefit plans, a plan may become underfunded even if the employer is fulfilling its minimum funding obligations. For example, if pension benefits are increased as a result of collective bargaining, it might take some time for the plan's trust fund to provide for the increase in obligations. Plans may also become underfunded when an employer obtains a waiver from the Internal Revenue Serivce allowing it to amortize payments over a period of years rather than pay them immediately. See 26 U.S.C. 412(d) (1982 & Supp. V 1987). And, of course, plans may become underfunded when the amounts paid as benefits exceed the actuarial predictions, as can happen when financial difficulties cause the layoff of large numbers of employees eligible for pension benefits. See Pension Benefit Guaranty Corp., *Promises at Risk* 26-27 (1987), *reprinted in PBGC Proposal to Initiate a Variable Rate Premium System; and Public Comments on Administration's Pension Plan Funding and Premium Rate Proposals: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 34-35 (1987); Congressional Budget Office, *Federal Insurance of Private Pension Benefits* 12-15 (Oct. 1987).

Under ERISA's "standard termination" procedure (29 U.S.C. 1341(b) (1982 & Supp. V 1987)), an employer may terminate a plan if the plan has sufficient assets to cover its liabilities.[2] If, as here, a plan is underfunded, an employer may seek a "dis-

[1] Under defined benefit plans, retirees receive a fixed amount per month based on factors such as final salary and years of service. Such plans differ from defined contribution plans, under which employers typically contribute a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. See 29 U.S.C. 1002(34) and (35). Insurance is not needed for defined contribution plans, since employees simply receive the money in their individual accounts. Insurance is needed for defined benefit plans, however, to ensure that funds are available to pay promised pensions.

[2] Special rules apply to multiemployer pension plans. See 29 U.S.C. 1381 *et seq.* The plans at issue here are single-employer plans.

tress termination" (29 U.S.C. 1341(c) (1982 & Supp. V 1987)), normally from a bankruptcy court. Such a "voluntary" distress termination is allowed if "the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, [the employer] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. 1341(c)(2)(B)(ii)(IV) (Supp. V 1987). Thus, a reorganizing company may terminate an underfunded plan only when the alternative is liquidation. 133 Cong. Rec. H11,969-H11,970 (daily ed. Dec. 21, 1987) (statement of Rep. Schulze).

An underfunded plan may also be terminated by the PBGC. Under 29 U.S.C. 1342(a) (1982 & Supp. V 1987), the PBGC may terminate a plan if, for example, it determines that the plan is seriously underfunded or that the possible long-run risk to the PBGC "may reasonably be expected to increase unreasonably if the plan is not terminated." If the PBGC's decision to terminate is contested, district court approval is required. 29 U.S.C. 1342(c) (1982 & Supp. 1987).

As a result of a termination, the PBGC becomes responsible for some, but not all, of the benefits due under the plan. The PBGC may not pay any beneficiary benefits of more than $750 per month in 1974 dollars—about $2,000 today (see *Promises at Risk*, *supra*, at 17)—even if an employee is entitled to greater benefits under the terms of a plan. 29 U.S.C. 1322(b)(3)(B). In addition, benefit increases resulting from plan amendments adopted within five years of the termination are not paid in full, and employees do not continue to accrue benefits under a plan once it is terminated. *Promises at Risk*, *supra*, at 17. These limitations operate as a form of coinsurance,

aligning the interests of employees with the PBGC and against termination. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989). The employer is not relieved of liability once it terminates a plan, since the PBGC may seek to recover from the employer (including members of its "controlled group" (see 29 U.S.C. 1301(a)(14) (Supp. V 1987)) pursuant to 29 U.S.C. 1362 (1982 & Supp. V 1987). However, the PBGC normally must stand in line with other creditors in a reorganization proceeding, and it has in the past averaged recovery of only eight cents on the dollar. *Promises at Risk*, *supra*, at 28.

Plans that have been terminated may be "restored" pursuant to Section 4047 of ERISA, 29 U.S.C. 1347 (1982 & Supp. V 1987). Section 4047 provides that, "[i]n the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status." The provision further states that the PBGC may "transfer to the employer * * * control of part or all of the remaining assets and liabilities of the plan." Thus, as a result of the restoration of a plan, the employer, rather than the PBGC, becomes responsible for the payment of benefits, and employees are entitled to all benefits due under the plan, not just the benefits insured by the PBGC.[3]

[3] Judicial approval is not required for a restoration decision to take effect, even though approval is usually necessary before an underfunded plan is terminated. The probable reason for the difference, as the district court noted, is that participants "may immediately experience cutbacks in their benefit payments" as the result of a termination, whereas

The PBGC has consistently made clear that it will restore a terminated plan if the employer creates an abusive "follow-on" plan. In three opinion letters, two in 1981 and one in 1986, it reiterated that "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. Accordingly, if an employer adopts a new plan that, "together with the guaranteed benefits paid by the PBGC under the terminated plan, provide for the payment of, accrual of, or eligibility for benefits that are substantially the same as those provided under the terminated plan" (J.A. 229), the PBGC views the plan as an attempt to shift liability to the termination insurance program while continuing to operate the plan.[4] In the PBGC's view, the termination in-

"either no change or an increase in benefits" follows from restoration. Pet. App. 89a.

[4] Whether a new plan, together with the PBGC's payments, provides "substantially the same" benefits must be decided on a case-by-case basis. Some cases are easy, however: in one of the cases in which the PBGC concluded that a new plan was impermissible, the new plan expressly stated that it would provide 95% of the difference between the benefits promised under the terminated plan and the benefits paid by the PBGC. Pet. App. 176a. More generally, the PBGC "views a set of arrangements as substantially the same if it grants credit for purposes of benefit accrual, or for eligibility for certain types of benefits, for service rendered under the terminated plan or if it provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC because of the limitations set forth in Title IV of ERISA." J.A. 229. Thus, a new plan is considered to be an abusive follow-on plan if it is tailored to make up for the benefits lost as a result of termination. The PBGC would not consider it abusive if, for example, an employer created new defined contribution plans that did not differentiate among participants based upon their past service.

surance program should provide benefits only when plans have really been terminated.

2. The LTV Corporation filed a reorganization petition in 1986. At that time, one of its subsidiaries, LTV Steel, operated three defined benefit pension plans that were underfunded by approximately $2.3 billion, including some $2.1 billion in insured benefits. See J.A. 138. LTV "readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. LTV Steel could not terminate the plans under Section 1341, however, because its collective bargaining agreement prohibited termination. 29 U.S.C. 1341 (a)(3) (Supp. V 1987). But after LTV informed the PBGC that it did not intend to make any further contributions to the already underfunded plans, the PBGC decided to terminate those plans under Section 1342. Pet, App. 41a. Since LTV Steel was not contributing to the plans, and since employees would continue to accrue benefits until the plans were terminated, delaying termination would have substantially increased the PBGC's potential liability. Moreover, LTV Steel had forecast that it might shut down some of its plants, and its collective bargaining agreement called for generous "shutdown benefits."[5] The PBGC would not be liable for the additional benefits if a shutdown occurred after termination of the plans, since it only pays benefits that have vested on the date of termination. The PBGC sought approval from the district court to terminate the plans and, with LTV's consent, the court approved the termina-

[5] LTV Steel had promised its employees that, in the event of a shutdown, they would immediately become eligible for pension benefits with no reduction to reflect that the benefits commenced prior to normal retirement age.

tion, making the PBGC the trustee of the plans. *Id.* at 42a.

The United Steelworkers of America (the Union), which had previously struck Wheeling-Pittsburgh Steel when it terminated its pension plans, threatened to strike unless its members received all the benefits due under the plans rather than the reduced benefits that would be paid by the PBGC. Pet. App. 43a. In June 1987, LTV Steel and the Union signed an agreement "which replaced most of the lost (*i.e.*, nonguaranteed) benefits to retirees and created new benefit programs for active workers." *Id.* at 44a. The program, including a similar program for salaried employees, would cost LTV Steel about $90 million annually. *Id.* at 47a.

The PBGC had previously advised LTV and the Union that it viewed the new arrangement as an abusive follow-on plan, and the PBGC's Executive Director testified to that effect in the bankruptcy court, but the bankruptcy court approved the agreement over the PBGC's objection in July 1987. Pet. App. 45a. The court noted that its action did not "preclude[] the PBGC from pursuing [other] options." J.A. 261. After meeting with LTV officials and offering to consider any information LTV wanted to provide, the PBGC concluded that LTV Steel's new plans were abusive. In reaching that conclusion, the PBGC noted, among other things, that "[o]ne component of the Follow-On Agreements, the Individual Account Trust ('IAT'), would, by its express terms, replace a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination. The IAT would provide up to 100 per cent of the difference and no less tha[n] 90 per cent of the amount not provided by PBGC." J.A. 234-235. The PBGC also concluded

that, at least for the foreseeable future, LTV Steel could afford to fund the terminated plans if they were restored.[6] In September 1987, the PBGC restored the three plans pursuant to Section 4047. Pet. App. 49a-50a.

3. LTV challenged the restoration decision, and the PBGC brought a federal court action to compel LTV Steel to comply with the decision. Pet. App. 51a-52a. The district court held the restoration decision unlawful. Although conceding that Section 4047 "contains little in the way of restrictive language" (Pet. App. 85a), the court held that the PBGC erred in considering the follow-on plans because "[t]he legislative history accompanying the enactment of section 4047 reveals that Congress expressly identified only improvements in the financial condition of the plan and its sponsor as possible grounds for restoration" (*id.* at 93a-94a). The court also noted that the PBGC in 1987 had supported legislation that would have precluded employers from establishing follow-on plans, but Congress, in amending the Act, did not enact such a provision. *Id.* at 97a-99a.

The court then noted a further statement in the legislative history of Section 4047 that restoration is appropriate "if some other factor made termination no longer advisable." Pet. App. 100a (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974)). However, the court held, "the Record does not support a finding that the PBGC's determination that the 1987 CBA Plans were abusive 'represents a reasonable accommodation of conflicting policies' within Title IV and between Title IV and other non-

[6] The PBGC had concluded that restoration would increase LTV Steel's costs by about $120 million annually, and that LTV Steel, which had a cash flow of $265 million in 1988, could handle that increase. Pet. App. 114a.

ERISA laws." Pet. App. 100a. In its view, the three opinion letters the PBGC had issued relating to other follow-on plans were irrelevant because the terminations there at issue were "voluntary," whereas the termination here was "involuntary." *Id.* at 100a-101a. It also noted that, even though LTV Steel was seeking to reorganize, it was required by 11 U.S.C. 1113 to bargain with the Union about modifications of their collective bargaining agreement. Pet. App. 102a-104a. Although, as the court stated, it was not disputed "that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated," or that the new plans "substantially achieved that goal," the record, in the court's view, did not contain "any analysis by the PBGC of the differences, as opposed to the similarities, between the old and new plans." *Id.* at 109a.

Turning to the PBGC's contention that, in light of LTV Steel's improved financial condition, it could afford to fund the plans, the district court first stated that the record "belies the PBGC's contention that an alleged improvement in LTV Steel's financial [condition] was an important factor in the restoration." Pet. App. 110a n.36. It also questioned the PBGC's conclusion that LTV Steel could fund the plans, and held that the administrative record did not support that conclusion. *Id.* at 118a.

The district court also held that the PBGC's restoration procedures were inadequate. Although the court agreed with the PBGC that it had "acted within its authority in attempting to evolve standards for restoration during an ongoing restoration proceeding" (Pet. App. 124a), the court concluded that the PBGC had failed "to set forth those standards with

sufficient clarity to permit LTV to challenge them" (*id.* at 125a).

4. The court of appeals affirmed the district court's opinion in all relevant respects. Pet. App. 1a-27a. It introduced its discussion of the merits by stating that "[a]lthough this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight" (*id.* at 16a), and by noting its conclusion that "a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other" (*id.* at 17a). "Rather," the court said, "PBGC focused inordinately on ERISA." *Ibid.* With respect to the PBGC's conclusion that "the adoption of the 1987 CBA Plans * * * constituted an abuse of the termination insurance program," the court determined that the PBGC could not take this factor into account because "[t]he legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration." *Ibid.* It noted, as the district court had, that Congress in 1987 failed to enact a proposal to outlaw follow-on plans, and stated that Congress's failure to do so "reflects the continuing consensus not to include the establishment of follow-ons as a basis for a restoration." *Id.* at 18a.[7]

Like the district court, the court of appeals found "problematic" the PBGC's conclusion that, "[b]ased on LTV's own cash flow projections, it appears that

[7] The court of appeals continued: "Not only is there no indication that the establishment of follow-ons is impermissible, but PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the 1987 CBA Plans were merely continuations of the old Plans." Pet. App. 19a.

the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation." Pet. App. 22a (brackets in original). It also agreed with the district court that the PBGC had followed inadequate procedures in restoring LTV Steel's plans. *Id.* at 26a.

SUMMARY OF ARGUMENT

Section 4047 does not itself set forth specific standards governing restoration of a pension plan, but instead authorizes the PBGC to determine when restoration is appropriate. Congress limited the PBGC's authority with respect to restoration only by directing it to act consistently with its duties under Title IV of ERISA. The PBGC did not abuse its broad discretion by determining that restoration is warranted in response to the adoption of follow-on plans.

One of the PBGC's duties under ERISA is to attempt to keep insurance premiums low. Follow-on plans subvert that goal. Employees and their unions, rather than vigorously opposing termination on the ground that benefits are likely to be reduced as a result, will not object if the employer promises to make up the difference. Employers in financial difficulty will therefore have a smoother road in attempting to shift their unfunded pension liabilities to the insurance fund, and if they succeed, premiums will inevitably rise. Such an increase in premiums may frustrate another purpose of Title IV by leading some employers to terminate their defined benefit pension plans in favor of other sorts of plans. And if solvent employers are dissuaded from sponsoring defined benefit plans, while insolvent employers are encouraged to terminate, the PBGC's financial perils can only increase. Finally, the PBGC's policy of prohibiting abusive follow-on plans serves still another of ERISA's purposes: by discouraging the termination of pension plans, it encourages the uninterrupted payment of full benefits.

The court of appeals never came to grips with the broad language of Section 4047. It focused instead on the legislative history—which noted that restoration would be warranted when an insolvent employer's financial condition improves—and concluded that Congress intended to authorize restoration only in that circumstance. That is clear error. It does not even comport with the legislative history, which stresses that restoration may be warranted in other circumstances. Nor is there merit to LTV's related contention that, as a practical matter, restoration is warranted only when an employer has fully recovered financially. The PBGC may reasonably conclude that, so long as immediate retermination is not likely, restoration is appropriate where an employer has attempted to shift its unfunded liabilities to the insurance fund while, in effect, continuing to operate its plans.

The court of appeals also erred by concluding that the PBGC had improperly focused on ERISA. Section 4047 directs the PBGC to determine whether restoration is appropriate in light of the purposes of ERISA, and does not direct it to consult the National Labor Relations Act or the Bankruptcy Code. Moreover, Congress has itself harmonized the three statutes by providing that pension plans should be terminated only as a matter of last resort. Specific provisions in ERISA require union approval prior to the termination of collectively bargained pension plans and direct bankruptcy courts to terminate plans only when necessary to prevent the liquidation of the sponsoring employer. The PBGC's position with re-

spect to follow-on plans, which discourages plan termination, is consistent with those provisions.

Finally, the court of appeals' conclusion that the PBGC erred in taking the follow-on plans into account in making the restoration decision infected its holding that the PBGC committed procedural error. With respect to the only two truly "procedural" errors asserted by the court below—lack of notice and opportunity for comment—there appears to be little warrant for the court's conclusion. In any event, to the extent that an issue of compliance with procedural requirements is raised, the cryptic opinion of the court below on that matter does not reveal the nature and bases of its conclusion with sufficient clarity to permit meaningful review by this Court.

ARGUMENT

THE PBGC HAS REASONABLY CONCLUDED THAT RESTORATION IS WARRANTED IN RESPONSE TO THE ADOPTION OF FOLLOW-ON PLANS

1. Section 4047 is a broad grant of authority to the PBGC. It provides that restoration is warranted in any case "in which the corporation determines such action to be appropriate and consistent with its duties" under ERISA. The only limit on the PBGC's authority is that the Corporation must determine that restoration is consistent with its duties "under this subchapter," *i.e.*, Title IV of ERISA. The purposes of Title IV are set forth in 29 U.S.C. 1302(a), where Congress provided that it intended "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out the obligations of this subchapter." See also 29 U.S.C. 1001b (Supp. V 1987). The PBGC's repeated determination that follow-on plans are abusive because "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program" (Pet. App. 162a, 167a, 173a) is consistent with its specific duties enumerated by ERISA.[8]

The PBGC's conclusion that the termination insurance program should provide benefits only when plans have really been terminated is virtually mandated by Congress's direction in Section 1302(a)(3) that the PBGC keep insurance premiums to a minimum. Those premiums have already increased dramatically over the last 15 years.[9] If employers in financial difficulty are able to transfer their unfunded liabilities to the PBGC and offer follow-on plans so that their employees do not object to plan termination, more employers will terminate pension plans

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[8] While opposing follow-on plans, the PBGC has not objected to employees obtaining all the benefits promised by an employer who terminates an underfunded plan if the Corporation recovers in full the amount of the unfunded benefits it has guaranteed. In such a situation, the insurance fund is not subsidizing the provision of non-guaranteed benefits. In 1987, Congress dealt with this issue by enacting 29 U.S.C. 1322(c) (Supp. V 1987), which provides that a portion of the PBGC's recoveries under 29 U.S.C. 1362 (1982 & Supp. V 1987) and other recovery provisions is to be allocated to the payment of benefits not guaranteed by the Corporation. (For a case on this problem prior to the 1987 amendment, see *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1982).)

[9] In 1974, the annual fee charged to employers was $1 per participant. The fee is now a variable rate of $16 to $50 per participant. See Pet. 4 n.4.

and the PBGC's deficit will increase. See pp. 22-24, *infra*. This case alone could add substantially to that deficit.[10]

Moreover, if follow-on plans are held to be permissible, other companies in financial trouble will likely follow LTV's lead, and terminate (or force the PBGC to terminate) plans with the understanding that they will provide lost benefits to their employees. As Senator Durenburger has stated, "it is no secret that other steel companies have considered following LTV's path, in an effort to resolve their pension liability responsibilities." 133 Cong. Rec. S14,901 (daily ed. Oct. 22, 1987). Wheeling-Pittsburgh Steel, which had terminated pension plans with unfunded liabilities of half a billion dollars, has already successfully relied on the decision below. *USWA* v. *PBGC*, Bankr. No. 85-793 (Bankr. W.D. Pa. June 30, 1989).[11] Thus, focusing on the steel industry alone, a decision invalidating the PBGC's policy against the institution of abusive follow-on plans could lead to a substantial increase in the PBGC's deficit. Unless general tax

[10] The PBGC's most recent annual report shows assets of $2.4 billion and liabilities of $4 billion, and thus a deficit of approximately $1.6 billion, not including this case. If the plans at issue are not restored, the PBGC will be responsible for additional unfunded liabilities of more than $2 billion. Although it would have a claim against LTV in the bankruptcy proceeding, the PBGC has in the past averaged recovery of only eight percent of employers' unfunded liabilities in such proceedings. *Promises at Risk, supra*, at 28.

[11] In an amicus brief urging the Court to review this case, five major domestic steel producers expressed the view that LTV Steel has obtained an unfair competitive advantage by transferring its unfunded pension liabilities to the insurance fund while they have continued to shoulder their responsibilities. Armco et al. Br. 11-13. If the decision below is upheld, some of those companies may follow LTV's lead.

revenues are used to bail out the PBGC, any effort to reduce that deficit would again require an increase in insurance premiums, contrary to the goal of Section 1302(a)(3).[12]

Large increases in premiums would, in turn, undermine the duty set out in Section 1302(a)(1)—encouraging the "continuation and maintenance" of defined benefit pension plans (the only type of pension plan governed by Title IV). See also 29 U.S.C. 1001b(c)(2) (Supp. V 1987) (stating that it is Congress's policy "to encourage the maintenance and growth of single-employer defined benefit pension plans"). One company, ACO, Inc., reported that the most recent increase in premiums led it to terminate its plan because it did not think it ought "to subsidize the poor funding practices of other companies." Chernoff, *Crushed by the Weight*, Pensions & Investment Age 1, 55 (Sept. 4, 1989). If such terminations by solvent companies become common, only ailing corporations anxious to shift their unfunded liabilities to the PBGC will want to sponsor defined benefit pension plans. Other companies will switch to, or institute, defined contribution plans.

The PBGC's determination that plans should be restored in response to the institution of abusive follow-on plans is also consistent with the purpose of Title IV of ERISA listed in Section 1302(a)(2): ensuring "the timely and uninterrupted payment of pension benefits." Since employers will not be able to use the insurance fund to subsidize ongoing benefit programs, the PBGC's restoration policy is likely to discourage the termination of pension plans. The policy therefore encourages the uninterrupted pay-

[12] Congress recently rejected a proposal to further increase insurance premiums. 135 Cong. Rec. H9453 (daily ed. Nov. 21, 1989).

ment of all benefits, including benefits the insurance program does not guarantee.

Thus, the PBGC's interpretation of Section 4047 is wholly consistent with the three stated objectives of Title IV, and should be sustained under any standard of review. In this case, moreover, the scope of the PBGC's discretion is especially broad, and the standard of review correspondingly narrow. Even when Congress has enumerated the circumstances in which a particular agency action is warranted, deference should be paid to the agency's reasonable interpretation of its organic statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Here, the circumstances in which restoration is appropriate have themselves been left for determination by the PBGC. Congress has provided in Section 4047 that restoration is warranted when "*the corporation* determines such action to be appropriate and consistent with its duties" (emphasis added).[13] The PBGC has not just been vested with authority to interpret a statutory provision setting forth the circumstances in which restoration is appropriate; it has been granted the very authority to make that determination. Accordingly, its decision that restoration is appropriate in cases where employers adopt abusive follow-on plans should not have been overturned.[14]

[13] The PBGC has therefore been given broader authority than that at issue in those cases where Congress explicitly delegates authority to construe a statute by regulation, and where the agency's interpretation is upheld unless it is " 'clearly inconsistent' with the statute or 'arbitrary'." *United States* v. *Morton*, 467 U.S. 822, 835-836 (1984).

[14] The courts below also erred in stating (Pet. App. 19a, 109a) that the PBGC did not adequately show that LTV Steel's follow-on plans substantially replaced the benefits lost as a result of the termination. It was "not disputed that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and that the new plans "substantially achieved that goal." *Id.* at 109a. Moreover, the administrative record showed that the follow-on plans "replace[d] a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination[,] * * * provid[ing] up to 100 per cent of the difference and no less than 90 per cent of the amount not provided by PBGC." J.A. 235. Thus, like the plans considered in the PBGC's opinion letters, LTV Steel's follow-on plans substantially replaced the benefits lost as a result of termination, and hence are abusive. In any event, the discussion of this point by the court of appeals was evidently not a basis for its judgment, since it concluded on other grounds that the character of *any* follow-on plans could not be considered by the PBGC.

2. Ignoring the broad statutory delegation of authority to the PBGC, the courts below focused instead on legislative history. They concluded that, in making restoration decisions, the PBGC may not consider the creation of abusive follow-on plans primarily because the legislative history of Section 4047 mentions financial recovery, but not follow-on plans, as a basis for restoration. Pet. App. 17a, 93a-94a. This approach cannot be squared with accepted principles of statutory construction—principles that are basic to the proper roles of Congress and the courts. The language of a statute—particularly language expressly granting an agency broad authority—is not modified by examples set forth in the legislative history. Examples, after all, are just that; they are illustrations of a statute's operation in practice, but they do not constitute definitive interpretations of the statute's scope. This is especially so where, as here, the relevant legislative history notes that, in addition to financial recovery, restoration would be appro-

priate "if some other factor made termination no longer advisable." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974).[15]

The courts below also concluded that the PBGC improperly failed to take into account statutes other than ERISA, namely the Bankruptcy Code and the National Labor Relations Act (NLRA). In so concluding, the courts again ignored the language of Section 4047. Congress explicitly directed the PBGC to take into account "its duties under this subchapter"—Title IV of ERISA—in making restoration decisions. Moreover, this is not a case where any particular provision of any other statute conflicts with the PBGC's actions.[16] Rather, the courts below

[15] The courts below erred in relying (Pet. App. 18a, 97a-99a) on the fact that in 1987 Congress considered, but did not enact, a provision that would have expressly authorized the PBGC to prohibit follow-on plans. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169-171 (1968). As this Court has stated, it is difficult to draw any conclusion from congressional inaction. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405, 411 (1962). That is particularly so here since Congress was aware of the action taken by the PBGC in this case at the time that it amended the statute: the Conference Report noted that LTV Steel's pension plans had been terminated and that "the PBGC recently took administrative action to restore three of those plans to their pre-termination status and require the LTV Corporation to continue operating those plans." H.R. Rep. No. 391, 100th Cong., 1st Sess., Pt. 1, at 106-107 (1987); see also *id.* at 178 (separate statement of Rep. Petri). Thus, although it was aware of the PBGC's rule that the adoption of follow-on plans was a ground for restoration, Congress did not amend Section 4047 to restrict the PBGC's discretion. The conclusion that Congress approved of the PBGC's rule is therefore at least as plausible as any other. Cf. *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

[16] Thus, LTV's reliance (Br. in Opp. 17) on *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174 (1962), and similar cases is misplaced. In *Burlington Truck Lines*, for example, the court directed the Interstate Commerce Commission to take into account the newly enacted "hot cargo" provision of the NLRA, 29 U.S.C. 158(e), in fashioning a remedy in favor of motor carriers injured when union members refused to handle certain "unfair goods."

thought that the PBGC erred by failing to give "due weight" to the "policies of bankruptcy and labor law." Pet. App. 16a. In these circumstances, the PBGC correctly based its analysis on the purposes of Title IV of ERISA as set forth in Section 1302.

Indeed, in Title IV of ERISA Congress has itself harmonized ERISA, the NLRA, and the Bankruptcy Code. With respect to the NLRA, Congress has provided that a company cannot voluntarily terminate its pension plan "if the termination would violate the terms and conditions of an existing collective bargaining agreement." 29 U.S.C. 1341(a)(3) (Supp. V 1987).[17] Thus, Congress has recognized an employer's obligation under the NLRA by providing that, in order to terminate a plan that was the product of collective bargaining, a company must obtain its union's permission. With respect to bankruptcy law, ERISA's termination provision states that a distress termination is available only if "the bankruptcy court (or other such appropriate court) determines that, unless the plan is terminated," the debtor "will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. 1341(c)(2)(B)(ii)(IV) (Supp. V 1987); see also 29 U.S.C. 1001b(c)(4) (Supp. V 1987) (stating that ERISA's policy is "to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in

[17] Section 1341(a)(3) (Supp. V 1987) makes clear that it does not limit the authority of the PBGC to terminate pension plans.

cases of severe hardship"). In other words, such a termination may be permitted only when necessary for an employer to stay in business. 133 Cong. Rec. H11,969-H11,970 (daily ed. Dec. 21, 1987) (statement of Rep. Schulze).

Since the insurance program does not cover all benefits, unions may be expected not to agree to the voluntary termination of a pension plan unless there is no other way to save the company. Bankruptcy courts should authorize distress terminations only in the same circumstance. And, under 29 U.S.C. 1342 (a) (1982 & Supp. V 1987), the PBGC will terminate a plan only as a last resort if necessary to protect the pension insurance program.

If abusive follow-on plans are allowed, Congress's scheme will be undermined since companies experiencing financial difficulties will find it much easier to terminate their pension plans. Rather than denying consent and threatening to strike over reduced benefits resulting from termination, unions will have little reason to withhold consent if the employer is allowed to make up lost benefits. And if a company cannot persuade a bankruptcy court to terminate a plan, even though it has the support of its union, it may be able to force the PBGC to terminate the plan by refusing to make contributions as they come due, thus increasing the amount of unfunded liabilities.[18]

[18] A statement in the court of appeals' opinion, if followed, would make it easier for employers to convince the PBGC to terminate plans "involuntarily." Specifically, the court noted its conclusion that "any claims arising out of LTV's obligation to pay into the pension plans are pre-petition debts" and thus are entitled to "no special priority." Pet. App. 23a-24a. If that is so, then employers in reorganization proceedings will be able to refuse to make their annual pension payments and the PBGC will be unlikely to obtain substantial recovery in the bankruptcy proceedings. Faced with mounting liabili-

Thus, if follow-on plans are permitted, more companies in financial difficulty will find that they can transfer their unfunded pension liabilities to the insurance fund by promising to adopt such plans. Contrary to Congress's intent as expressed in Sections

ties but little prospect of substantial recovery, the PBGC may decide that it is prudent not to allow benefits to continue to accrue. See 29 U.S.C. 1342(a) (1982 & Supp. V 1987).

We believe the court of appeals' statement is both potentially damaging to the termination insurance fund and incorrect as a matter of law. Like wages, pension obligations attributable to periods after a reorganization petition has been filed are administrative expenses entitled to the first priority under 11 U.S.C. 507(a)(1). Wages are entitled to first priority as an administrative expense because they must be paid in order to keep the reorganizing company in business (3 L. King, *Collier on Bankruptcy* ¶ 507.04, at 507-24 (15th ed. 1989)), and in enacting the Bankruptcy Code, Congress recognized that fringe benefit demands are often substituted for wage demands during collective bargaining. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 357 (1977). Contributions to pension plans are "analogous to wages in that the guarantee of future benefits is often considered by labor and management to be a form of present compensation" and therefore should also be given first priority. *Columbia Packing Co.* v. *PBGC*, 81 Bankr. 205, 208 (D. Mass. 1988); see also *In re Pacific Far East Line, Inc.*, 713 F.2d 476, 480 (9th Cir. 1983). In addition, the Bankruptcy Code provides that claims for contributions to pension plans "arising from services rendered within 180 days before the date of the filing of the petition" are entitled to fourth priority. 11 U.S.C. 507(a)(4). Thus, in the case of an employer who filed a reorganization petition in mid-1986, its 1987 payment to a pension plan would be entitled to first priority. Its 1986 payment, or portions of it, would have either first or fourth priority depending on whether it was attributable to the period after the filing of the reorganization petition or within 180 days before the filing of the petition. Delinquent contributions for prior periods —but only such contributions—would not be entitled to these priorities.

1341 and 1342, employers will seek to terminate pension plans as a matter of first, rather than last, resort. And, as stated above (pp. 15-16, *supra*), insurance premiums will again rise, contrary to the goal of Section 1302(a)(3).

3. LTV erroneously suggests (Br. in Opp. 21 n.14) that an employer's adoption of an abusive follow-on plan is of little or no concern because, as a practical matter, the only question should be whether the employer can afford to fund the pension plans that were terminated. To be sure, an employer's financial situation may be relevant to any restoration decision. Thus, on the one hand, even though an employer had instituted an abusive follow-on plan, the PBGC would not engage in the futile and possibly counterproductive act of restoring a plan that was certain to be reterminated in the immediate future.[19] On the other hand, whether or not the employer had adopted an abusive follow-on plan, the PBGC would likely order restoration where a financial turnaround made it virtually certain that the employer could afford to fund the plan for the foreseeable future.

But many cases will fall between these extremes. For example, it may be clear that the employer can fund the plan for the near future while the plan's long-term prospects are less clear. In those cases, the PBGC may reasonably conclude that the findings justifying restoration ought to vary depending on whether the employer has adopted an abusive follow-on plan. Where an employer has adopted such a plan, the PBGC may order restoration if there is no significant chance of immediate retermination. In the absence of such abuse, however (or if the court below

[19] Here, for example, the PBGC did not restore a fourth plan because, among other things, it had insufficient assets to pay benefits then due. J.A. 316, 318.

is correct that abuse may not be taken into account), the PBGC might reasonably decide to require greater evidence of financial improvement.[20] Thus, contrary to LTV's contention, the existence of follow-on abuse, and the PBGC's authority to take it into consideration, may well be critical.[21]

4. LTV also noted, with respect to the court of appeals' brief discussion of the PBGC's procedures, that "[t]wo of the four failings list[ed] by the Court of Appeals [Pet. App. 26a]—the failure to employ 'ascertainable standards' or to provide 'a statement of its reasoning'—go to the substance of the administrative record rather than the procedures used to compile it." Br. in Opp. 25-26. We agree that those two alleged deficiencies, while labeled "procedural" by the court, are actually substantive. The PBGC issued a notice of restoration that explained its reasons for restoring the plans. Pet. App. 182a-183a. Two months earlier, the executive director of the PBGC had filed an affidavit in the bankruptcy court

[20] We leave to the PBGC discussion of the question of the appropriate standard for determining whether, in the absence of follow-on abuse, restoration is warranted on the basis of financial improvement.

[21] We believe the record in this case supports the PBGC's determination that restoration is appropriate because (a) LTV Steel has adopted abusive follow-on plans and (b) LTV Steel's financial condition poses little risk of immediate retermination. The plans have sufficient assets to pay benefits for several years. Pet. App. 116a-117a. In addition, LTV Steel paid \$150 million for capital improvements and paid off \$433 million in pre-petition bank debt in 1986 and 1987, and therefore could have made its pension contributions in those years. *Id.* at 112a. And its 1988 cash flow of \$265 million was sufficient to cover the incremental cost of restoration, which the PBGC calculated to be \$120 million. *Id.* at 114a. Furthermore, the prospects for the domestic steel industry have improved significantly.

explaining the PBGC's objections to the follow-on plans. J.A. 226-230. Her explanation referred to the three opinion letters in which the PBGC concluded that "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. Therefore, the court of appeals could not have meant that the PBGC had provided no reasons and had proceeded in accordance with no standards. Rather, as LTV recognized, the court's statement must reflect its conclusion that the PBGC's standards and reasons were defective.

Because the court of appeals' discussion of the procedural issue was so tied to its resolution of the substantive issues, it is unclear whether the court would have found the PBGC's procedures inadequate had it upheld its substantive determinations. In its one-page discussion of the procedural issue (Pet. App. 26a), the court did little more than identify (among the four alleged deficiencies) the two truly "procedural" defects it claimed to exist—that the PBGC had failed to give LTV either adequate notice of the material on which it was basing its decision or an opportunity to comment on that material—and it did not indicate whether and to what extent it gave them independent significance.[22] Nor did the court discuss the Administrative Procedure Act—which imposes no procedures for informal adjudication [23]—or otherwise

[22] The court said only that "[f]ailure to do any of these [four] things renders the decision arbitrary and capricious." Pet. App. 26a.

[23] The APA sets forth procedures for formal and informal rulemaking (5 U.S.C. 553) and formal adjudication, *i.e.*, "adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554(a)). An agency's governing statute may prescribe procedural requirements for informal adjudications, but Title IV of ERISA sets out no procedural requirements for restoration decisions.

explain the source of its notice and comment requirement.[24]

There is little basis for the court of appeals' conclusion that the PBGC did not provide an adequate opportunity for notice and comment. With respect to the PBGC's reliance on LTV Steel's adoption of abusive follow-on plans, LTV had notice that the PBGC objected to the plans. In fact, LTV had acknowledged that "[e]ight times the PBGC attempted without success in the Bankruptcy Court, in the District Court and in the Court of Appeals to stay approval and implementation of the collective bargaining agreement" on account of the follow-on plans. Br. in Opp. 8. Moreover, LTV and PBGC representatives met on a number of occasions and discussed the PBGC's objections to those plans. Pet. App. 126a. With respect to the PBGC's consideration of LTV

[24] The court of appeals did rely on *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 288 n.4 (1974), a due process case. Pet. App. 26a. However, LTV did not suggest in the court of appeals that it had any property interest in not having its pension plans restored, and we doubt that it does. Rather, LTV argued that notice and comment are mandated by the judicial review provision of the APA. It argued, quoting *Independent U.S. Tanker Owners Committee* v. *Lewis*, 690 F.2d 908, 922-923 (D.C. Cir. 1982) (footnote omitted): "despite the Supreme Court's dictum in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, [435 U.S. 519 (1978)] that courts may not add to the procedural requirements of the APA except in "extremely rare" circumstances, we are justified in demanding some sort of procedures for notice, comment, and a statement of reasons as a necessary means of carrying out our responsibility for a thorough and searching review." LTV C.A. Br. 43.

Steel's financial situation, it is undisputed that the PGBC relied almost exclusively upon information that LTV had provided to the courts or to federal agencies, so LTV cannot be heard to challenge the accuracy of that information.[25]

*   *   *   *

Both of the parties to this litigation and the courts below have regarded the question of the scope of the PBGC's restoration authority as the crux of this case. On that crucial question, the court of appeals erred in failing to recognize the importance of the PBGC's statutory authority to deter and to remedy follow-on abuse.

[25] If this Court believes there may be a question of compliance with any procedural requirements, we think it appropriate not to address that question now. The question whether any such requirements may or should be imposed in cases of informal adjudication not involving constitutionally protected interests is a novel and important one. In our view, it should not be reached until the court below has first had an opportunity to consider and explain, in the light of this Court's decision on the substantive issues, just what the nature and basis of its procedural holding is. Its present decision on that question is far too cryptic to permit meaningful review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1989

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No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 14, 1989

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IN THE
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE AMERICAN SOCIETY OF PENSION ACTUARIES TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The American Society of Pension Actuaries (ASPA) hereby moves the Court pursuant to Supreme Court Rule 36.1 for leave to file the accompanying brief as *Amicus Curiae* in support of Petitioner.

In support of the motion, ASPA states as follows:

1. Both PBGC and LTV have given written consent to the filing of a brief by ASPA; however, The LTV Bank Group has refused consent. Consequently, this motion is necessary.

2. ASPA is a non-profit corporation established under 501(c)(6) of the Internal Revenue Code. ASPA has roughly 3,000 members nationwide, who provide actuarial, consulting, and administrative services to approximately 30 percent of the qualified retirement plans in the United States. A substantial number of these plans are single-employer defined benefit plans and thus subject to the PBGC single-employer insurance program, which is the subject matter of this case.

3. ASPA is an interested party because a decision upholding the conclusion of the Second Circuit Court of Appeals would result in higher PBGC premiums and thus negatively impact the single-employer defined benefit pension system. The preservation of this pension system is of vital concern to our members and is critical to our country's ability to provide adequate retirement income.

4. We believe our extensive experience in the operations of single-employer defined benefit plans in general, and the operations of PBGC in particular, enables us to provide this Court with valuable information.

WHEREFORE, ASPA respectfully requests leave to file the accompanying brief as *amicus curiae*.

Dated: December 14, 1989

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QUESTIONS PRESENTED

1. May a reviewing court vacate a restoration decision under Section 4047 of ERISA because PBGC failed to defer to policies underlying the bankruptcy and labor laws?

2. May a reviewing court substitute its judgment for PBGC's as to the appropriate standard for restoration on the basis of improved financial circumstances?

3. May a reviewing court substitute its judgment for PBGC's as to the appropriate procedures to be followed in informal adjudication?

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Society of Pension Actuaries submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States in support of the petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 875 F. 2d 1008. The appeal was taken from the judgment of the United States District Court for the Southern District of New York dated September 13, 1988.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on May 12, 1989. PBGC timely filed its Petition for Writ of Certiorari on September 11, 1989, and this Court granted the Writ on October 30, 1989.

STATEMENT OF THE CASE

LTV Corporation (LTV) sponsored three defined benefit plans (Plans) subject to the PBGC single-employer insurance program. In December 1986, LTV advised PBGC that it was unable to continue to fund these Plans. PBGC's internal working group estimated that the $2.1 billion in the Plans' underfunding would increase substantially unless the Plans were immediately terminated. With LTV's consent, the Plans were terminated by PBGC effective January 13, 1987. The Court of Appeals for the Second Circuit upheld the termination of the Plans against the challenge of the United Steel Workers of America (USWA) and noted that PBGC could restore the Plans if subsequent events justified such action. *Jones & Laughlin Hourly Pension Plan v. The LTV Corp.*, 824 F.2d 197, 202 (2d Cir. 1987).

On September 22, 1987, the Executive Director of PBGC issued a Notice of Restoration for these Plans based on LTV's establishment of follow-on plans and its financial improvement. The United States District Court for the Southern District of New York vacated the Notice of Restoration and PBGC appealed. The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court and PBGC filed a timely appeal from that decision.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Society of Pension Actuaries (ASPA) is a non-profit organization with about 3,000 members who provide actuarial, consulting, and administrative services to approximately 30 percent of the qualified retirement plans in the United States. A substantial number of these plans are single-employer defined benefit plans subject to the PBGC termination insurance program. It is our view that a decision against PBGC in the instant case would have a substantial negative effect on the PBGC single-employer insurance program and on the defined benefit pension system in general.

The immediate impact of a decision adverse to PBGC would be that PBGC would be responsible for about an additional $2 billion in unfunded liabilities of the Plans. PBGC could attempt to recover 75 percent of this amount from LTV, but historically such recoveries have been very limited. Accordingly, PBGC would lose, at a minimum, approximately 1/2 billion dollars if the Plans are not restored. Since the single-employer insurance program is primarily funded by premiums from participating employers, it is apparent that a premium increase would ultimately be necessary to cover this cost and the cost of similar cases. By way of background, it should be noted that when PBGC first began operations in 1974, the premium was $1 per participant. Plan sponsors now pay a premium of between $16 and $50. Thus, there has already been a very significant increase in the premium expense for sponsors of voluntary single-employer defined benefit plans.

In recent years, there have been many difficulties confronting defined benefit plans, which provide the most secure retirement benefits to employees. Single-employer defined benefit plans cover approximately 30 million individuals. In recent years, the laws affecting the defined benefit system have been changed with great frequency and sponsors of such plans have been confronted with substantially increased compliance and administrative costs. As a result, the percentage of American workers covered under defined benefit plans has decreased significantly in the 1980s. An increase in PBGC premiums

resulting from a decision adverse to PBGC in this case would aggravate this situation and make it more difficult for the private pension system to provide adequate retirement benefits.

There is another aspect of this case which is very disturbing--the standard for statutory construction that has been utilized by the Court of Appeals for the Second Circuit. In its discussion of the merits the Second Circuit stated, "Although this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." The Second Circuit stated further that "PBGC focused inordinately on ERISA." ASPA submits that such a standard for statutory construction is not only legally inappropriate, but will also produce significant practical difficulties both for PBGC and other government agencies, and for the public who must deal with these agencies. Rather than accept the clear meaning of a statute, which is not in conflict with other statutes, the Court of Appeals has employed a convoluted process which attempts to ascertain the purposes of statutes not under consideration in its review of the application of the pertinent statute to the facts in the instant case. It is critical for the proper functioning of our legal system that judgments be made with reasonable certainty as to the meaning of a statute. The standard employed by the Court of Appeals would inject a huge degree of uncertainty into any effort to make a determination as to the authority of PBGC or of any government agency. Such uncertainty would be severely disruptive to the efforts of PBGC and other government agencies to administer federal statutes, and of the public to comply with them since, utilizing the Court of Appeal's standard, courts could construct unanticipated interpretations without regard to the clarity of any specific statute.

SUMMARY OF ARGUMENT

A. PBGC HAS BEEN GRANTED BROAD AUTHORITY TO RESTORE PLANS UNDER ERISA § 4047 AND IT IS INAPPROPRIATE TO REQUIRE DEFERENCE TO POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

B. IT IS INAPPROPRIATE FOR THE SECOND CIRCUIT COURT OF APPEALS TO SUBSTITUTE ITS JUDGMENT FOR PBGC'S AS TO THE APPROPRIATE STANDARD FOR RESTORATION ON THE BASIS OF IMPROVED FINANCIAL CIRCUMSTANCES.

C. A GOVERNMENT AGENCY SHOULD BE ACCORDED SIGNIFICANT LATITUDE AS TO THE APPROPRIATE PROCEDURES USED IN INFORMAL ADJUDICATION, BARRING A VIOLATION OF FUNDAMENTAL FAIRNESS. THE RECORD OF THIS CASE DOES NOT INDICATE THAT THERE HAS BEEN SUCH A VIOLATION.

ARGUMENT

A. PBGC HAS BEEN GRANTED BROAD AUTHORITY TO RESTORE PLANS UNDER ERISA § 4047 AND IT IS INAPPROPRIATE TO REQUIRE DEFERENCE TO POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

Congress has expressly granted to PBGC broad authority to restore terminated plans. Section 4047 of ERISA states:

> In the case of a plan which has been terminated under section 4041 or 4042, the corporation, [PBGC], is authorized <u>in any such case in which the corporation, [PBGC], determines such action to be appropriate and consistent with its duties</u> under this title [Title IV of ERISA], to take such action as may be necessary to restore a plan to its pretermination status....

[Emphasis added]. The above statutory language clearly provides PBGC with broad authority to restore a plan if such action is appropriate and consistent with its duties under ERISA. Two of its specific duties, as provided in Section 4002(a), are to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, and to maintain premiums established by PBGC under Section 4006 at the lowest level consistent with carrying out its obligations under this title.

In a situation such as this one, where the available financial evidence indicates a change for the better in the financial circumstances of the plan sponsor, it is clearly appropriate and consistent with its duties for PBGC to restore the plan in order to minimize its financial burden, and thus keep premiums at the lowest possible level. Such restoration would also serve to encourage the continuation and maintenance of voluntary pension plans by reducing the potential burdens of higher premiums on plan sponsors at a time when such sponsors are already required to pay premiums which have increased significantly and when such sponsors also face a myriad of other problems resulting from changes in the pension laws.

Thus, PBGC clearly has the authority to restore the Plans in this situation.

The Second Circuit Court of Appeals stated, "Because ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and, to the extent possible, honored the policies underlying them." The Court of Appeals stated further, "In the instant case, a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other. Rather, PBGC focused inordinately on ERISA. This failure renders PBGC's decision arbitrary and capricious."

This is not a case in which there is a direct conflict between two statutes, which might justify the utilization of such an ambiguous standard of statutory interpretation. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). It is noted that the Court of Appeals did not hold that there was a violation of any provision of the bankruptcy or labor laws in PBGC's actions. Thus, the emphasis on the policies of other laws is unprecedented and improper in this situation.

The application of the standard utilized by the Second Circuit would result in great cost and confusion to both administrative agencies and the public. It would require that any administrative agency carefully consider and document every major area of law that could conceivably relate to its actions. Not only would this require incomprehensible amounts of time and financial resources on the part of the agencies, but it would create tremendous difficulties for those affected by agency actions to determine with any degree of certainty the appropriate scope of authority of any particular agency.

B. IT IS INAPPROPRIATE FOR THE SECOND CIRCUIT COURT OF APPEALS TO SUBSTITUTE ITS JUDGMENT FOR PBGC'S AS TO THE APPROPRIATE STANDARD FOR RESTORATION ON THE BASIS OF IMPROVED FINANCIAL CIRCUMSTANCES.

The Second Circuit Court of Appeals accepted a change in financial circumstances as an appropriate basis for plan restoration, but replaced PBGC's standard with one of its own--the "long term ability" of a company to fund its plan. The standard enunciated has no basis in ERISA, and is inconsistent with the principle that an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). More specifically, this Court stated in *Chevron* that a court must accept an agency's interpretation unless "the interpretation is expressly foreclosed by a clearly expressed legislative intent." Therefore, while statutory construction of an ambiguous statute is the function of the courts, its power to review an agency determination is limited. Where an agency administering a statute has determined the question of the specific application of a broad statutory term, that decision is to be accepted by the courts if it is reasonable. Furthermore, the long term ability to fund standard interferes with the "type of judgment which administrative agencies are best equipped to make." *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). It should be noted that PBGC has been analyzing the financial condition of plans and employers since 1974 and has determined that the kind of long-term predictions required by the Second Circuit Court of Appeals cannot be made on a reliable basis.

By August of 1987, PBGC determined that the financial factors on which it had relied in terminating the Plans had significantly changed. Among these factors cited by PBGC were that the steel industry was experiencing a dramatic financial turnaround, contrary to the predictions of experts in late 1986, and information submitted by LTV to its creditors indicated that LTV had substantially exceeded its business projections of operating income. Additionally, the establishment of follow-on plans by LTV at a substantial cost provided strong additional evidence of changed financial circumstances. These factors clearly indicate that PBGC's restoration of the Plans, on the basis of changed financial circumstances, was an appropriate one.

The PBGC has argued that there is yet another standard for restoration, what it terms the "abusive follow-on plans" standard. We believe this argument that "abusive follow-on plans" constitute a separate basis for restoration is misguided. It is our view that the establishment of follow-on plans provides evidence of changed financial circumstances and is not a separate standard for restoration. Rather, it should be viewed as subsumed in the changed financial circumstances standard. For example, in another case, a follow-on plan may involve a minimum expenditure of funds of the plan sponsor and there may be no other factors indicating a favorable change in financial circumstances. We do not believe that restoration would be reasonable in such a situation since the available evidence would not provide any indication that the plan sponsor would be able to fund the plan. In the instant case, however, there is ample evidence of changed financial circumstances, including the establishment of follow-on plans involving significant costs.

C. A GOVERNMENT AGENCY SHOULD BE ACCORDED SIGNIFICANT LATITUDE AS TO THE APPROPRIATE PROCEDURES USED IN INFORMAL ADJUDICATION, BARRING A VIOLATION OF FUNDAMENTAL FAIRNESS. THE RECORD OF THIS CASE DOES NOT INDICATE THAT THERE HAS BEEN SUCH A VIOLATION.

The Second Circuit Court of Appeals concluded that the procedures employed by PBGC to reach its restoration decision rendered the decision arbitary and capricious.

Section 4047 of ERISA does not prescribe any procedures to be followed by PBGC when reaching a restoration decision. Furthermore, this Court stated that imposing "rigid requirement[s] ... would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." 332 U.S. at 202. This Court also stated that "if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored

to reach what the court perceives to be the 'best' or 'correct' result, judicial review will be totally unpredictable." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978). Thus, this Court has recognized that agencies should be provided a significant degree of latitude in formulating their procedures, as long as the procedures employed are fundamentally fair. Applying this principle to the instant case, this Court should not reject PBGC's procedures on an arbitrary and capricious standard since the record does not reflect a failure to adhere to fundamental standards of fairness.

CONCLUSION

This Court should reverse the decision of the Second Circuit Court of Appeals and uphold PBGC's restoration of the Plans.

Respectfully Submitted,

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MOTION FILED

DEC 14 1989

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IN THE

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PENSION BENEFIT GUARANTY CORPORATION,
Petitioner

—v.—

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, AND WILLIAM W. SHAFFER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PENSION BENEFIT GUARANTY CORPORATION

AND

BRIEF AMICUS CURIAE OF ARMCO, BETHLEHEM STEEL CORPORATION, INLAND STEEL INDUSTRIES, INC., NATIONAL STEEL CORPORATION, AND USX CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation hereby move this Court for leave to file a brief amicus curiae in support of the Pension Benefit Guaranty Corporation's appeal to enforce the Restoration Notice in the captioned case, pursuant to Rule 36.3 of the Supreme Court Rules.

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation (collectivly the "Steel Companies") are five of the six largest domestic steel producers. The sixth company and the third largest domestic steel producer is LTV Steel Company ("LTV Steel"), a subsidiary of LTV Corporation ("LTV Corp."). The Steel Companies produce 47 percent of the steel manufactured in the United States. All of the Steel Companies fund separate pension plans that are currently covered by the Pension Benefit Guaranty Corporation ("PBGC") which was created under Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1301, *et seq.* Together, the Steel Companies' pension plans pay benefits to thousands of retirees and other beneficiaries. Participants (employees, retirees and other beneficiaries) in the retirement plans maintained by the Steel Companies constitute a majority of all the participants in pension plans in the domestic steel industry.

The Steel Companies have a direct interest in the outcome of this appeal for two reasons. First, as sponsors of pension plans and contributors to the federal insurance program, the Steel Companies have an interest in a strong and well-funded PBGC insurance program. The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other companies, including the Steel Companies, that sponsor covered pension plans, by jeopardizing the financial health of the

insurance program, and by in all likelihood forcing another increase in PBGC insurance premiums.

Second, the Steel Companies, as major competitors of LTV Steel, have been and will continue to be adversely impacted by LTV Corp.'s transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against the Steel Companies in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. All of the Steel Companies are attempting to modernize and restructure facilities, but none of the Steel Companies has shed its pension liabilities onto the PBGC, and each continues to meet or exceed ERISA's minimum funding standards. By comparison, LTV Steel has diverted resources that would otherwise have gone to meet its pension funding obligations to modernize its facilities, reduce its production costs and to otherwise dramatically improve its competitive position, all while continuing to make a profit and provide its workers with essentially the level of pension benefits that existed prior to the bankruptcy filing. This artificial competitive advantage gained by LTV Steel through abuse of the federal pension insurance program subverts the declared national policy in favor of fostering and maintaining a strong domestic steel industry without a federal bailout.

The issues raised by the PBGC present important questions regarding the integrity of the national pension insurance program and the continued protection of its participants and beneficiaries. These issues are of great significance to the Steel Companies because if the decision of the Second Circuit is allowed to stand, LTV Steel will have received, in effect, a bailout loan from the federal government, one which grants a decisive competitive advantage to LTV Steel and distorts competition in the steel industry as a whole, and one which seriously weakens the financial integrity of the federal pension insurance program. Such a result, if allowed to stand, subverts the national policy in favor of a strong domestic steel industry and undermines the purpose of Title IV of ERISA.

Counsel for the Steel Companies has requested consent of the parties below to file the accompanying Brief Amicus Curiae. The Steel Companies have received consent of the PBGC*, LTV Corp. and LTV Steel*, the Parent Creditors of the Official Committee of Unsecured Creditors*, the Official Committee of Equity Security Holders*, David H. Miller and William W. Schaffer*, and BancTexas†. The remaining parties below have not responded as of the time of press. For the foregoing reasons, the Steel Companies seek leave of this Court to file the following brief amicus curiae in support of the PBGC in the captioned appeal.‡

Respectfully submitted,

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*A copy of a written consent has been filed with the Clerk along with this Motion and Brief.

†A copy of a written consent will be filed with the Clerk when it is received.

‡By order dated October 30, 1989, this Court granted the Motion of the Steel Companies to file a brief amicus curiae in support of the PBGC's Petition for a Writ of Certiorari.

MOTION FOR LEAVE TO APPEAR AND GIVE ORAL ARGUMENT

The Steel Companies move this Court, pursuant to Rule 38.7 of the Supreme Court Rules, for leave to appear and give oral argument before the Court at the time and date scheduled for argument of the parties on the merits. Counsel of Record for the Steel Companies requested consent of the PBGC to appear and give oral argument, but the PBGC has declined the request. The Steel Companies believe that the instant appeal presents issues of extraordinary importance to the national steel industry, and that the Steel Companies, as amici curiae, are uniquely situated to present legal and policy arguments that will place the dispute between LTV and the PBGC in its full and proper context. Thus, the Steel Companies seek leave of this Court to appear and give oral argument for a period of fifteen (15) minutes in addition to the time allotted to the parties.

Respectfully submitted,

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Attorneys for Movants
Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation

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No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,

Petitioner

—v.—

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER, AND WILLIAM W. SHAFFER,

Respondents.

BRIEF AMICUS CURIAE OF ARMCO, BETHLEHEM STEEL CORPORATION, INLAND STEEL INDUSTRIES, INC., NATIONAL STEEL CORPORATION, AND USX CORPORATION

INTEREST OF AMICI

Armco, Bethlehem Steel Corporation, Inland Steel Industries, Inc., National Steel Corporation and USX Corporation (collectivly the "Steel Companies") are five of the six largest domestic steel producers. The sixth company and the third largest domestic steel producer is LTV Steel Company ("LTV Steel"), a subsidiary of LTV Corporation ("LTV Corp.").[1] The Steel Companies produce 47 percent of

[1]LTV Corp. and its subsidiary, LTV Steel, will be referred to collectively as "LTV."

the steel manufactured in the United States. All of the Steel Companies fund separate pension plans that are currently covered by the Pension Benefit Guaranty Corporation ("PBGC") which was created under Title IV of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1301, et seq. Together, the Steel Companies' pension plans pay benefits to thousands of retirees and other beneficiaries. Participants (employees, retirees and other beneficiaries) in the retirement plans maintained by the Steel Companies constitute a majority of all the participants in pension plans in the domestic steel industry.

The Steel Companies have a direct interest in the outcome of the PBGC's appeal for two reasons. First, as sponsors of pension plans and contributors to the federal insurance program, the Steel Companies have an interest in a strong and well-funded PBGC insurance program. The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including the Steel Companies, by jeopardizing the financial health of the federal insurance program, and by in all likelihood forcing another increase in PBGC insurance premiums. *See* Petition of PBGC for Writ of Certiorari at 4 n.4 (hereafter "Petition of PBGC").

Second, the Steel Companies, as major competitors of LTV Steel, have been and will continue to be adversely impacted by LTV's transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against the Steel Companies in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. All of the Steel Companies are attempting to modernize and restructure facilities, but none of the Steel Companies has shed its pension liabilities onto the PBGC, and each continues to meet ERISA's minimum funding standards. The decision below, allowing LTV to convert the pension guaranty program into a federal bailout program for one steel manufacturer, runs contrary to the national policy, articu-

lated by both Congress and the Executive Branch, of fostering and maintaining a strong domestic steel industry.

While the PBGC presents several important questions in its brief on the merits, the Steel Companies here address questions of the substantive congressional policies embodied in ERISA and various enactments affecting the steel industry as a whole.

SUMMARY OF ARGUMENT

The Second Circuit's failure to enforce the PBGC's Restoration Notice subverts express congressional intent to create a pension insurance program of last resort, and erodes congressional policy of maintaining a strong and competitive steel industry. LTV Steel has gained unfair competitive advantages, such as accelerated modernization and capital improvement, undertaken with funds made available by the termination of LTV's pension plans. The PBGC correctly found that LTV's improved financial circumstances justified restoration of the terminated plans, and the PBGC's finding is further supported by LTV's published financial results in 1987, 1988 and 1989.

ARGUMENT

The refusal of the Court of Appeals for the Second Circuit to enforce the PBGC's Restoration Notice raises issues of grave national importance to the steel industry and to all participants and beneficiaries of the Pension Benefit Guaranty Corporation's pension insurance fund. LTV skillfully placed itself in a position that caused the PBGC to terminate certain of its pension plans, and then objected to responsible efforts on the part of the PBGC to restore those plans when LTV subsequently demonstrated its willingness and ability to fund the pension plans. LTV, in its post-bankruptcy dealings with the PBGC and its own labor unions, sought to achieve the twin goals of shedding the cost of its pension plans while maintaining the high level of pension benefits for its workers in order to buy labor peace and obtain unfair economic advantages over its competitors within the domestic steel industry.

Ultimately, the PBGC's Restoration Notice should be enforced because restoration furthers the purpose of Title IV of ERISA as well as the national policy of supporting the domestic steel industry. The Second Circuit erred by failing to recognize these policies and by misconstruing the "arbitrary and capricious" standard of judicial review of an administrative determination. Indeed, the PBGC's determinations that LTV's follow-on plans are an abuse of the pension insurance program and that LTV is and has been capable of meeting its pension obligations are fully supported by the Administrative Record as well as other post-termination public financial information made available by LTV.

I. The Failure of the Second Circuit to Enforce the PBGC's Restoration Order Subverts the Express Congressional Intent to Create a Pension Insurance Program of Last Resort and to Maintain a Strong and Competitive Domestic Steel Industry.

As a program of last resort, the Title IV Insurance Program is designed to protect the pension expectations of American workers, not to bail out a financially-troubled company. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). The Second Circuit's decision makes the PBGC in effect an investor in LTV Steel rather than a guarantor of pension benefits, and the decision threatens the financial integrity of the pension insurance program. In addition, the decision frustrates the national policy expressed by Congress of fostering a strong and modernized domestic steel industry.

A. The PBGC's Restoration Notice Fully Accords with the Goals and Policies of ERISA.

Title IV of ERISA was enacted to provide an insurance fund of last resort. It reflects, and was intended to set at rest, the congressional concern for catastrophies faced by employees who lose vested benefits, in whole or in part, if a business or pension plan fails. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. at 17, *reprinted in* Legislative History of

the Employment Retirement Income Security Act of 1974, Volume I, p. 1085 ("ERISA Leg. Hist."). Prior to the enactment of ERISA, Congress recognized that employees might well "receive nothing or less than they had expected" because employers were not required to insure their pension liabilities. *Id.* This problem was highlighted in the Senate Report accompanying ERISA, which referred to the Studebaker plant closing at South Bend, Indiana. Some 4,000 employees between the ages of 40 and 60 received only approximately 15 percent of their vested benefits, despite the fact that the Studebaker plan's vesting was fairly generous and the plan funding would have been adequate had the plant remained open. *Id.* In response to this "great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated," Congress established a pension insurance program under Title IV of ERISA. *Id.* The congressional purpose was to insure certain classes of pension benefits of American workers when the employer was incapable of funding its pension liabilities.

Congressional statements at the time of passage of ERISA confirm that Congress intended Title IV funds to be used only *in extremis*, to protect the beneficiaries of covered pension plans from "a loss of benefits as a result of inadequate assets to meet the vested liabilities of the plan." 120 Cong. Rec. H4283 (1974), *reprinted in* II ERISA Leg. Hist. at 3382. The insurance was to come into play only if the sponsoring company was entirely unable to fund its pension liabilities as a result of the termination of the business. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. 87, reprinted in 1974 U.S. Code Cong. & Admin. News at 4971, and I ERISA Leg. Hist. at 1155; *see also Nachman Corp. v. PBGC, supra*, 446 U.S. at 375 (Congress intended to insure that a worker actually receives the benefit that has been promised upon retirement if he has fulfilled the conditions required to obtain that benefit).

The 1986 amendment of ERISA, the Single-Employer Pension Plan Amendment Act ("SEPPAA"), 29 U.S.C. §1001 *et seq.*, further underscores congressional concern about potential abuse of the pension insurance program. In enacting SEPPAA, Congress recognized that "the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and other premium-payers." 29 U.S.C. §1001b(a)(4). Accordingly, in 1986, before the termination of LTV's plans, Congress modified Title IV for the additional purposes of "increas[ing] the likelihood that participants and beneficiaries under single employer defined benefit pension plans will receive their full benefits," and "provid[ing] for the transfer of unfunded pension liabilities onto the single-employer pension plan termination system only *in cases of severe hardship.*" 29 U.S.C. §1001b(c)(3) and §1001b(b)(2) (emphasis added).[2]

The Second Circuit concluded that the PBGC did not have authority to restore a pension plan to an employer upon the determination that the employer's follow-on plans constituted an abuse of the pension insurance fund, because Congress had not specifically enumerated establishment of abusive follow-on plans as a ground for restoration. *Pension Benefit Guaranty Corp., et al. v. LTV Corp., et al.*, 875 F.2d 1008, 1017 (2d Cir. 1989). Although Congress may not have enumerated follow-on plans as a specific ground for restoration, Congress has expressly given the PBGC the authority and discretion to restore terminated plans, and has described the goals and responsibilities of the PBGC

[2]Although the Pension Protection Act in 1987 gave the PBGC the right to recover from the employer 100 percent of benefits paid out under a terminated program, the PBGC's restoration authority still remains of paramount importance in avoiding abuse of the pension insurance program. As the PBGC explained in its Petition for Writ of Certiorari, the PBGC has historically recovered only a few cents on the dollar in a recovery action. *See* Petition of PBGC for Writ of Certiorari (hereafter "Petition of PBGC") at 15 n.14.

in ERISA's statement of purpose in the broadest terms.[3] *See Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 209 (1947) (independent agency is not limited to exercising powers that are specifically enumerated, but is empowered to act to carry out the intent of Congress in adopting the underlying statute).

The statutory provision empowering the PBGC to restore pension plans to employers contains a broad grant of discretion to the PBGC for determining administratively the circumstances under which restoration is necessary and appropriate. Section 1347 of ERISA, 29 U.S.C., states:

> In the case of a plan which has been terminated under Section 1341 or 1342, the [PBGC] is authorized in any such case in which the [PBGC] determines such action to be appropriate and consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pre-termination status . . . .

The Second Circuit's conclusion that the PBGC cannot restore LTV's pension plans without a direct and specific authorization from Congress is incorrect, as the PBGC's restoration notice in this instance is clearly within the broad grant of discretion allowed by Congress under ERISA and SEPPAA. The PBGC's decision to restore the LTV plans is fully in accord with the goals of preserving the long term strength of the PBGC pension insurance program, and having the PBGC assume responsibility for a pension plan only

[3]Those enumerated goals include: encouragement, continuation and maintenance of voluntary private pension plans for the benefit of plan participants, provision for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which Title IV applies, and maintainance of premiums at a reasonable level. 29 U.S.C. §1302(a). In 1986, Congress added several objectives through the SEPPAA amendments, including the encouragement, maintenance and growth of single-employer defined benefit pension plans, the increase in likelihood that participants and beneficiaries under such plans will receive their full benefits, and, as noted above, limitation of transfer of unfunded pension liabilities onto the single-employer pension plan termination system only in cases of severe hardship. 29 U.S.C. §1001b(c)(3) and §1001b(b)(2).

in the last resort when an employer is unable to meet its pension obligations. The mere fact that Congress has not enumerated a power does not deny a federal agency that power, as long as it falls within the discretion allowed the agency and is consistent with the goals and policies of the underlying authorizing statute. *Chenery Corp., supra,* 332 U.S. at 208-09.[4]

The PBGC's conclusion that LTV Steel's financial condition had substantially improved since its plans were terminated, provides ample additional, independent justification for the PBGC's Restoration Notice.[5] This conclusion underscores the fact that LTV Steel was not so much unable as unwilling to fund its pension liabilities. To allow LTV Steel to avoid its pension obligations is to ratify the pernicious

[4]The Second Circuit also based its conclusion on an analysis of legislative history that developed following the termination and restoration of LTV's plans, including consideration by Congress of additional amendments to ERISA in 1987. The Second Circuit found persuasive the fact that Congress "considered and rejected [in 1987] the idea of prohibiting the establishment of follow-on plans and making the establishment of such plans a basis for a restoration decision." *PBGC v. LTV,* 875 F.2d at 1017. As a matter of statutory interpretation, no conclusion can be derived from Congressional action or inaction in 1987, absent a specific statement on the part of Congress that a given amendment was rejected because Congress believed that the PBGC should not have such power. In fact, the decision of Congress not to enact specific amendments requiring the prohibition of establishment of follow-on plans and making the establishment of such plans a basis a restoration is equally consistent with the conclusion that Congress believed that the PBGC *already had the power to restore pension plans to an employer in the face of an abusive follow-on plan.* Congress may not have wanted to limit the PBGC's discretion in determining under what circumstances a follow-on plan fell into the category of "abusive". Thus the general rule of statutory interpretation that no inference may be drawn from legislative action or inaction after the enactment of the original statute should be applied in the instant case and the ERISA and SEPPAA provisions applied as they stood at the time the PBGC restored the plans. *See, e.g., Waterman Steamship Corp. v. United States,* 381 U.S. 252, 268-69 (1965) ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *United States v. Price,* 361 U.S. 304, 313 (1960); *Fogarty v. United States,* 340 U.S. 8, 14 (1950) (abortive action of subsequent Congress cannot supplant the contemporaneous intent of the Congress which enacted the original act).

[5]*See infra,* Section II, A at 18.

idea that a troubled company can transfer its pension plan to the PBGC's pension insurance program and use the savings derived therefrom to recapitalize, modernize and revitalize the company as a going concern. Such a result is not the purpose for which ERISA was enacted, nor for which the PBGC and the pension insurance program were created. The decision below conflicts with congressional intent with regard to ERISA and turns the PBGC into a federal bailout program for troubled companies, a result which, in practice, could bankrupt the federal pension insurance program altogether.[6]

The PBGC's original decision to terminate LTV's pension plans was justified in late 1986 and early 1987, given the state of the steel market and prospects for the domestic steel industry as a whole. Yet, the bleak outlook predicted in late 1986 failed to materialize, and the steel industry, including LTV Steel, has since experienced a resurgence. LTV was in fact wholly able to meet its pension obligations by mid-1987, and its successful fight against restoration has resulted in what is, in effect, a federal bailout of LTV Steel. Allowing this subsidy to continue subverts the policy of ERISA, undermines the strength of the pension insurance program, and places the burden of that subsidy on LTV's competitors and other plan sponsors through increased premiums.[7]

B. The Decision of the Second Circuit Frustrates the National Goal of Fostering a Strong and Competitive Steel Industry without Federal Funds.

Special concern has been expressed by members of Congress about the health and survival of the domestic steel

[6]*See* Petition of PBGC at 4 ("Despite . . . repeated increases [in annual premiums] the PBGC currently has liabilities of $4 billion and assets of only $2.4 billion, leaving a deficit of more than $1.5 billion, *exclusive of the liabilities at issue in this case.*") (emphasis added).

[7]Based on historical precedent, a rise in premium costs is a very real and immediate concern. *See* Petition of PBGC at 4 n.4.

industry because of its importance to both the national economy and national security. The PBGC's Restoration Notice to LTV Steel accords with this congressional concern by maintaining the delicate competitive balance among the steel producers that is so vital to fostering and nurturing a strong domestic steel industry. Conversely, the decision of the Second Circuit to vacate the Restoration Notice has granted LTV Steel significant unfair competitive advantages over other steel producers who are competing in the steel market while continuing to fund their pension plans. The Second Circuit's decision distorts and weakens the competitive environment in the domestic steel industry.[8]

In 1988, Congress considered the Steel and Aluminum Energy Conservation and Technology Competitiveness Act of 1988, 15 U.S.C. §§5101-5110. Speaking in support of the bill, Congressman Walgren of Pennsylvania stated that modernization of the steel industry is critical because:

> continuous and adequate supply of steel is the foundation of our economy and our national security. Many industries, like automobiles, depend on steel; many communities have steel at their core. The National Academy of Science has observed that there are four times as many indirect jobs in industries depending upon steel for business per year as there are direct jobs in the steel industry.

Representative Walgren also emphasized that production of military hardware depends on steel and that the United States must maintain a strong steel industry capable of providing for national defense needs. 134 Cong. Rec. H10019 (Oct. 12, 1988).

[8]Despite condemning the PBGC for failing to consider areas of national policy other than the integrity of the ERISA insurance fund, 875 F.2d at 1015-16, the Second Circuit at no point considered national steel policies in its decision.

Congressional support for a strong steel industry was also expressed in the Findings and Purposes of the Steel Imports Stabilization Act, introduced in 1984. Section 802(a)(6) of the Act stated the finding that implementation of a "national [program] for the steel industry will substantially improve the economy and employment in both the steel and iron ore-producing sectors." Pub. L. 98-573, Title VIII, §801-808 (Oct. 30, 1984) (now codified as an amendment to 19 U.S.C. §2253; see Notes to 19 U.S.C. §2253 (1989 Supp.)).

Members of Congress and the Executive Branch have expressed with equal clarity a preference that the steel industry modernize and reorganize to become more competitive without significant federal intervention in the form of financial support. For instance, Congressman Ernest Konnyu of California, speaking in support of the Steel and Aluminum Energy Conservation and Technology Competitiveness Act of 1988, stated that it is the private sector's investments, rather than those of the federal government, that are necessary to maintain a viable domestic steel industry. 134 Cong. Rec. H10020 (Oct. 12, 1988). President Reagan issued a Steel Decision in 1984, in which he rejected government intervention in the steel market, choosing to rely instead on fair trade and market forces to maximize opportunity for the domestic steel industry to recover and modernize. 49 Fed. Reg. No. 184, 36813 (Sept. 20, 1984).

Congress recently extended the Steel Imports Stabilization Act, 19 U.S.C. §2253 *et seq.*, by passing H.R. 3275, the Steel Trade Liberalization Program Implementation Act, which allows the President to extend the Voluntary Restraint Agreements ("VRAs") negotiated with steel exporting nations. Speaking in support of extending the Act, Representative Gaydos repeated Congressional concern for the health of the steel industry: "[T]he steel industry is basic to the economic health of this country . . . [and] a strong steel industry is vital if the United States is to remain competitive in the world market." 135 Cong. Rec. H6418 (Oct. 2, 1989). Likewise, Senator Lloyd Bentsen,

speaking in favor of the measure during consideration by the Senate, emphasized the link between fair trade policies implemented by the federal government and investment and modernization on the part of the steel industry itself:

> This link between the continuation of enforcement authority and industry efforts is a key element of our steel policy. Import protection alone will not accomplish our objective, a viable and internationally competitive domestic steel industry. It must be matched by affirmative industry efforts to modernize and become more productive.

135 Cong. Rec. S16941 (Nov. 21, 1989). President Bush recently signed H.R. 3275 to implement the Steel Trade Liberalization Program through March 31, 1992, thus continuing the policy of the Reagan Administration and of the Congress to encourage continued modernization of the domestic steel industry by supporting fair competition without government subsidies.

By vacating the PBGC's Restoration Notice, the Second Circuit has directly undercut the goal of fostering a strong national steel industry. As a practical matter, the Second Circuit's decision gives LTV an unfair advantage over other major steel producers in efforts to reinvest and modernize to become more competitive. Although the financial condition of LTV has now improved sufficiently to enable it to meet its funding obligations for the three terminated plans, LTV, unlike the other steel producers, has been freed from those obligations by the Second Circuit's decision. As a consequence, LTV has gained approximately $200 million each year for use to modernize its industrial base in the course of reorganization. By comparison, the Steel Companies have met or exceeded the minimum funding requirements of ERISA for their pension plans, and continue to do so, all the while struggling to allocate sufficient resources for capital improvements in order to remain competitive in the market.

C. Failure to Enforce the Restoration Notice Provides LTV Steel With Unfair Competitive Advantages.

Failure to restore the pension plans is projected by the Steel Companies to provide LTV with a cost advantage of about $20 per ton,[9] which in turn will favorably affect LTV's profit margins. Such a cost advantage will also result in access by LTV to capital at more satisfactory terms, making LTV more attractive to lenders, shareholders and other investors. Moreover, it gives LTV additional flexibility to maintain and even increase its market share. While the immediate competitive impact of this bailout has been cushioned somewhat by stronger steel industry results, the transfer of LTV's unfunded pension liabilities to the PBGC is likely to become more significant as the demand for steel products moderates.

During the current period of Chapter 11 protection, LTV has greatly improved its competitive position by making substantial capital expenditures which were enabled in large part by using the funds resulting from termination of its pension plans. LTV's record of capital spending since its Chapter 11 filing has been carried out on an impressive scale. For example, following the bankruptcy filing, LTV made significant capital expenditures at its Indiana Harbor Works and at its Cleveland plants, including a number of "enhancements" at these facilities.[10] Actual and projected capital enhancements for the Indiana Harbor Works and the Cleveland facility together total in excess of one billion dollars.

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[9]PBGC projects that restoration of the LTV plans would result in an incremental annual pension cost to LTV of about $200 million. If the LTV plans are not restored, the incremental pension cost not incurred by LTV represents a "cost advantage" to LTV Steel that would be equivalent to about $20 per ton based on the current level of shipments.

[10]As used herein, the term "enhancements" refers to expenditures in excess of base spending required to maintain facilities at current operating capacity and efficiency.

These capital expenditures will reduce LTV Steel's costs and improve the efficiency of its operations, thereby providing it with a substantial future cost advantage over other steel producers. This cost advantage will also enable LTV to continue to make more extensive capital expenditures than it otherwise would have made had it continued to pay its pension obligations.

The cost advantage gained by LTV if its pension plans are not restored also provides it with the flexibility to pursue alternate strategies designed to further enhance its competitive position in the steel market. Based on LTV's average realized price in 1987 of $495 per ton of steel (1987 LTV Annual Report, p. 10), a $20 per ton cost advantage would increase its net income by an amount equivalent to about 4% of sales. This is a particularly significant increase in a mature industry that had an average net loss equivalent to 2.6% of net sales for the period 1979 to 1987 and for which the highest average annual steel related net income for American Iron and Steel Institute ("AISI") companies as a group was 3.8%. (1987 Annual AISI Statistical Report).

From 1987 through mid-1989, demand for steel remained relatively high. In such an environment, LTV has had no real need to use its cost advantage to maintain or increase its market share. However, since mid-1989, the resurgence of the domestic steel industry has abated some as the domestic demand for steel has declined. This recent development highlights the fact that a cost advantage of $20 per ton gives LTV considerable pricing flexibility to reduce prices and maintain or increase its market share to the detriment of other steel producers which have continued to meet their pension obligations. This is particularly unfair and unwarranted when the ability of LTV to afford the restored plan has been demonstrated by the PBGC.[11]

[11]*See, infra*, Section II at 17.

Notwithstanding the improved performance by the steel industry in the late 1980's, steel producers continue to face serious problems which originate or are aggravated by a shortage of capital to implement much needed modernization and restructuring programs. In the mid-1980's, stock prices and stockholder's equity in steel companies declined in the face of the strong dollar, increased foreign competition, and the adverse competitive impact of outmoded domestic production facilities. Major restructuring costs associated with plant shutdowns have left many steel companies in an unfavorable credit position. As a result, the major steel producers suffered several reductions in credit ratings, limiting their ability to attract sufficient capital to meet restructuring and modernization needs. By comparison, despite LTV's bankruptcy, LTV's attractiveness to investors and lenders is now greatly enhanced by the PBGC's assumption of LTV's pension liabilities of about two billion dollars. LTV can be expected to emerge from bankruptcy to operate into the foreseeable future in a significantly stronger financial position than before its plans were terminated.

D. The Second Circuit's Decision May Invite Other Employers to Shed Pension Plans onto the PBGC, thus Further Burdening the Fund and its Participants.

The liabilities transferred to the PBGC by the decision of the Second Circuit to vacate the PBGC's Restoration Notice will place an unfair higher premium burden on other steel producers and other employers whose premiums fund the Title IV insurance fund. Speaking about the plight of the PBGC under the burden of LTV's pension termination, Senator John Heinz of Pennsylvania noted that allowing the company to "dump" its retirement obligations on the federal government essentially transfers the company's liabilities to its competitors through higher insurance premiums and a greatly under-funded pension benefit guaranty fund. 133 Cong. Rec. S11387 (Aug. 6, 1987). Representative William Clay of Missouri, speaking in opposition to a proposal

to increase PBGC premiums substantially, stated that "LTV Corporation is the most prominent example of management that has chosen to put its money elsewhere [rather than contributing to its sponsored pension plans] and now expects to have others pay for the pension benefits it promised." 133 Cong. Rec. H11971 (Dec. 21, 1987). Permitting a major actor in the steel market to gain additional funding for investment by abusing the Title IV pension insurance program weakens the domestic steel industry and leaves the enormous deficit thereby created in the PBGC fund to be made up through increased premium payments from other steel companies and other employers.

The District Court in this case recognized the logic of the PBGC's concern that, without restoration, the path of LTV Steel may become "irresistible" to other steel companies. *In re Chateaugay Corporation*, 9 E.B.C. 2236, 2249 (S.D.N.Y. 1988). Indeed, other steel companies might conclude that they have no other choice. The resulting financial disruption could hurt the steel industry and cripple the PBGC at the same time. The danger of this unfortunate prospect was recognized in the Senate by Senator David Durenburger of Minnesota, speaking in support of the Steel Retirement Benefits Funding Act (S.1811):

> [W]hen the LTV Corp. filed a Chapter 11 bankruptcy petition last year, it sent a clear signal to its domestic competitors. The message from LTV was simply that the easiest way for a steel company to cut cost was to declare bankruptcy and unload the company's pension liabilities onto the Pension Benefit Guaranty Corporation. . . . Moreover, it is no secret that other steel companies have considered following LTV's path in an effort to resolve their pension liability responsibility.

133 Cong. Rec. S14901 (Oct. 22, 1987). Thus, the decision of the Second Circuit could have a corrosive effect on the will of the domestic steel industry to continue to meet pension obligations, and runs directly counter to the policy of fostering and maintaining a strong domestic steel industry without federal funds. The twin goals of preserving the termination insurance program under Title IV of ERISA to protect the pensions of American workers when a true disaster occurs, while at the same time fostering a strong and more competitive domestic steel industry, are clearly enhanced by enforcement of the Restoration Notice issued by the PBGC. The Second Circuit's decision significantly undermines these goals. Enforcement of the Restoration Notice by this Court is necessary to preserve the integrity of the insurance program and to restore the competitive forces required for a strong domestic steel industry.

II. The PBGC's Finding that LTV is Able to Meet its Minimum Funding Obligations to the Terminated Plans is Fully Supported by the Administrative Record.

The financial condition of LTV has improved significantly since the termination of its plans in January, 1987. This improvement reflects, in large part, the favorable economic change which affected all domestic steel companies, beginning in 1987 and continuing to mid-1989. LTV, like other companies in the steel industry, benefited from a reduction in imports, increased domestic demand, and improvement in productivity and prices. LTV's improved financial condition cannot, therefore, be wholly attributed to the Chapter 11 reorganization process. One significant advantage which LTV Steel derived from the Chapter 11 proceedings, however, was the ability to reject unfavorable supply contracts—a benefit that should continue after reorganization and should be unaffected by the restoration of the LTV pension plans.

LTV's improvement was readily apparent at the time of the PBGC's Restoration Notice. Moreover, LTV has continued to show increasing financial strength. The PBGC correctly recognized LTV's improved financial condition when it ordered restoration. The Administrative Record below demonstrates that the PBGC examined LTV Steel's finan-

cial condition in detail before concluding that it was able to fund its terminated pension plans. The financial data were presented to a working group meeting of the SEPPA Committee on August 10, 1987. The working group concluded that LTV could fund the terminated plans, and, indeed, that LTV Steel alone was able to fund its obligations to the terminated pension plans. J. App. at 317-18. The working group recommended three grounds for restoration, and these became the bases of the Restoration Notice ultimately issued: "LTV Steel's establishment after the termination of the plan of a retirement program [that resulted in] an abuse of the pension plan termination insurance system established by Title IV of ERISA; LTV Steel's improved financial circumstances; and LTV Steel's demonstrated willingness to fund employee retirement arrangements." Appendix to Petition of PBGC at 182a.

Further analysis of LTV based upon public documents also demonstrates that LTV is fully able to meet its pension obligations under the terminated plans. These factors alone are sufficient to support the PBGC's decision to enforce the Restoration Notice.

A. Analysis of Results in 1987, 1988 and 1989 and Comparison with Performance of Similarly Situated Major Competitors of LTV Steel Further Demonstrate that LTV Steel is able to meet its Pension Funding Obligations.

An analysis of LTV's public disclosure of financial information shows that LTV is and has been capable of meeting its pension obligations under the terminated plans, and, indeed is in no worse condition than any other major steel producer in the market.

LTV Corp. and LTV Steel cannot dispute that their overall financial picture improved substantially in 1987.[12] In

[12] The PBGC's administrative decision was predicated on LTV's improved financial condition as shown by the first two quarters of 1987. We have set forth additional data confirming PBGC's determination that LTV's positive results would continue for the full 1987 year, and in 1988 and 1989, in an Appendix to this Brief. *See* App. at A-1.

1987, LTV Corp.'s liquidity improved by more than $480 million over 1986 (1987 LTV Corp. Annual Report, p.2), and LTV experienced a net cash flow from operations of $761 million.[13] This positive result was achieved after capital expenditures of $344 million and repayment of bank debt and principal repayments on long-term debt of $450 million.

LTV Steel accounted for a significant portion ($370 million) of LTV Corp.'s overall 1987 cash flow from operations. During 1987, LTV Steel also invested $286 million in capital expenditures to modernize facilities which will further enhance its future competitive position. In addition, LTV Finance paid $300 million and LTV Steel paid $137 million of debt outstanding under bank credit facilities. (1987 LTV Steel Form 10-Q, p. 35).[14] At the same time, the improved profitability of LTV Steel permitted LTV Corp. to maintain a balance of cash and marketable securities in the amount of $585 million at the end of 1987.[15]

LTV Corp.'s financial condition continued to improve substantially in 1988. For calendar year 1988, LTV Corp.'s net cash flow was $423 million after $413 million in capital expenditures. *See* App. A-1. Thus, a total cash balance of $1.009 billion was achieved by year end 1988. Although LTV Steel had zero net cash flow for 1988, it produced that

[13] The cash flow data referred to in this section of the brief is set out in the Appendix hereto. Cash flow data is used because measurement and consideration of net cash flow, stated in terms of available cash and marketable securities is more relevant to the question of an employer's ability to fund its pension obligations than "net income."

[14] Subsequent to its Chapter 11 filing and through the first six months of 1988, LTV Steel has transferred all available cash to LTV Corp., including $175 million in the first six months of 1988 thereby increasing its cash advance to LTV Corp. to $433 million at June 30, 1988. (LTV Corp. June 30, 1988 Form 10-Q, pp. 17-18).

[15] The overall 1987 results stemmed in large part from the elimination of LTV Steel's unfunded pension liabilities, though Chapter 11 related factors also contributed to the outcome as well. (1987 LTV Corp. Annual Report p. 2).

figure by making capital expenditures of $351 million as part of an aggressive modernization program, and by transferring $372 million in cash to LTV Corp. Without these expenditures and contributions, LTV Steel would have accounted for a significant portion of LTV Corp.'s 1988 net cash flow. *See* App. A-2. Moreover, because of bank credit facilities in the form of $479 million in revolving credit availability and $136 million in letters of credit availability (1988 LTV Corp. Annual Report, p. 17), LTV Corp. achieved an even better liquidity position, in excess of $1.6 billion at the end of 1988.

Summarized, the liquidity of LTV Corp. at year-end 1988 was as follows:

LTV CORPORATION
($ Millions)

Cash Balance on 12/31/88	$1,009
Revolver Facilities	479
Letter of Credit Facility	136
Total Liquidity 12/31/88	$1,624

During the first nine months of 1989, LTV continued to have a positive cash flow. During that period it had a net cash flow of $20 million after $250 million in capital expenditures, while its cash balance increased to $1.029 billion. LTV Corp. Sept. 30, 1989 Form 10-Q, at 5. *See* App. A-1. Although LTV Steel had a zero net cash flow in that period, it again made significant capital expenditures ($214 million) and made large cash transfers ($104 million) to LTV. *See* App. A-2.

Accordingly, LTV has had and continues to have considerable financial flexibility to make a substantial cash settlement with creditors under a reorganization plan, and will be better able to absorb any cyclical downturn which may occur in the steel industry. Thus, the 1988 and (to date) 1989 results further confirm the PBGC's determination that LTV can afford the terminated pension plans on a continuing basis without jeopardizing the reorganization process.

LTV Steel's ability to fund its plans is further illustrated by the actual experience of LTV Steel's competitors in meeting their pension funding obligations. For example, Bethlehem Steel Corporation ("Bethlehem") has business and pension plan characteristics substantially similar to LTV Steel and it also experienced improved financial results in 1987 and 1988. The different manner in which LTV Steel and Bethlehem have addressed their pension commitments underscores the competitive implications and inequities that result from failure to restore the LTV plans.

Public records show that, as of January 1, 1986, the beginning of the plan year immediately prior to the termination of the plans at issue in this case, the Bethlehem pension plan and the LTV pension plans were underfunded by roughly the same amount—about $1.7 to $2.0 billion. The minimum ERISA required pension contributions (exclusive of waived and unpaid amounts)[16] for the 1986 plan year (payable by September 15, 1987) for both LTV and Bethlehem would have been about $150 to $200 million. Of course, even though its cash flow was sufficient to fund the terminated plans, LTV's pension contribution in 1987 was zero because of the plan terminations. By comparison, Bethlehem did not terminate its pension plan in 1987, and made contributions totaling $289 million for the 1987 plan year and still experienced an increase in its cash liquidity of $89 million from the end of 1986. (1987 Bethlehem Annual Report and 1988 Bethlehem Third Quarter Report.) Furthermore, while the minimum ERISA funding requirements for the Bethlehem pension plan for the 1987 and 1988 plan years (payable by September 15 of the following year) were $174 million and $34 million, respectively, Bethlehem actually contributed $289 million to its pension plan for the 1987 plan year and $691 for the 1988 plan year. Other Steel Companies have

[16]Contributions to the LTV Steel plans for 1984, totalling $175 million, were waived by the IRS in 1985. Waiver requests for $215 million in the 1985 plan year contributions were denied. LTV Steel made some contributions in 1986 to amortize the 1984 waivers but no contributions were made for the 1985 plan year.

also fulfilled their pension obligations despite pressure to divert cash into modernization of facilities and other projects to improve their competitive positions.

In summary, analysis of LTV's financial situation and the actions of other major steel producers with unfunded liabilities similar to LTV Steel demonstrates that LTV can fully fund its obligations under the terminated plans while continuing to reorganize and modernize its facilities.

CONCLUSION

For the foregoing reasons, the Steel Companies respectfully support the position of the Pension Benefit Guaranty Corporation, and urge this Court to reverse the Court of Appeals for the Second Circuit, and order enforcement of the Restoration Notice.

Respectfully submitted,
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APPENDIX

CASH FLOW EXPERIENCE
($ Millions)

LTV Corporation

	1987	1988	1989 (9 months)
Net Income	$ 503	$(3,154)	192
Depreciation Expense	250	242	173
Working Capital Changes	128	67	(149)
Other	(120)	3,592	(6)
Net Cash From Operations Excl. Interest & Past Service	761	747	210
Investing Activities			
Capital Expenditures	(344)	(413)	(250)
Proceeds From Sale of Property	11	93	45
Other	(4)	28	19
Financing Activities			
Principal Pmts-Bank & L-T Debt	(450)	(31)	(4)
Principal Pmts-Pension & L-T Debt	—	—	
Net Increase/(Decrease) in Cash	(26)	423	20
Cash balance (end of year)	$ 585	$ 1,009	$1,029

CASH FLOW EXPERIENCE
($ Millions)

LTV Steel Co.

	1987	1988	1989 (9 months)
Net Income	$ 323	$(2,502)	258
Depreciation Expense	214	200	136
Working Capital Changes	175	48	(128)
(Increase)/Decrease in A/R from Aff.	(300)	40	38
Other	(42)	2,888	(37)
Net Cash From Operations	370	672	267
Investing Activities			
Capital Expenditures	(286)	(351)	(214)
Transfer (To)/From LTV Corp.	50	(372)	(104)
Proceeds From Sale of Property	9	53	40
Advances to Raw Material Affil.	(6)	0	11
Financing Activities			
Principal Pmts-Bank & L-T Debt	(137)	(2)	–
Principal Pmts-Pension & L-T Debt	–	–	–
Net Increase/(Decrease) in Cash	0	0	0
Cash balance (end of year)	$ 0	$ 0	$ 0

MOTION FILED
DEC 14 1989

(15)

No. 89-390

In the Supreme Court of the United States

October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, LTV STEEL COMPANY, INC., OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, SUBCOMMITTEE OF PARENT CREDITORS OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV CORPORATION, LTV BANK GROUP, OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS, BANCTEXAS DALLAS, N.A., FIFTH THIRD BANK, HUNTINGTON NATIONAL BANK, CITIBANK, N.A., DAVID H. MILLER AND WILLIAM W. SHAFFER,
Respondents

Motion for Leave to File and Brief Amicus Curiae of Retired Employees Benefits Coalition, Inc.

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9 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Retired Employees' Benefits Coalition, Inc. (REBCO) hereby moves this Court for leave to file a brief amicus curiae in support of the Pension Benefit Guaranty Corporation's appeal to enforce the Restoration Notice in this captioned case, pursuant to Rule 36.3 of the Supreme Court Rules.

In support of the motion, REBCO states as follows:

1. REBCO is a not-for-profit Pennsylvania corporation. Its 11,100 members consists of retired salaried employees of Bethlehem Steel Corporation (Bethlehem) and spouses. REBCO members are plan participants in Bethlehem's pension plans.

2. REBCO's members and spouses have a direct interest in the outcome of this case. As plan participants in Bethlehem's pension plans, REBCO's members have an interest in a strong and well-financed Pension Benefit Guaranty Corporation (PBGC). The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including Bethlehem.

3. Bethlehem, as a major competitor of LTV Steel, has been and will continue to be adversely impacted by LTV's transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against Bethlehem in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. Bethlehem is attempting to modernize and restructure facilities, but has not shed its pension liabilities onto the PBGC. Bethlehem continues to meet ERISA's minimum funding standards. Allowing LTV to convert the pension guaranty program into a federal bailout program for one steel manufacturer places in jeopardy Bethlehem's ability to fund adequately its pension plans, to the disadvantage of REBCO members and spouses.

4. Counsel for REBCO has requested consent of the parties below to file the accompanying Brief Amicus Curiae. REBCO has received consent of the PBGC, LTV Corp. and LTV Steel, the Parent Creditors of the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, David H. Miller and William W. Schaffer, Huntington National Bank, and BancTexas.* The remaining parties below have not responded as of the time of press. For the foregoing reasons, REBCO seeks leave of this Court to file the following brief amicus curiae in support of the PBGC in the captioned appeal.

Respectfully submitted,

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Dated: December 14, 1989

*A copy of each written consent will be filed with the Clerk when received.

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INTEREST OF AMICUS

The membership of the Retired Employees' Benefits Coalition, Inc. (REBCO) consists of retired salaried employees of Bethlehem Steel Corporation (Bethlehem) and spouses. REBCO members are plan participants in Bethlehem's pension plans.

REBCO's 11,100 members and spouses have a direct interest in the outcome of this case for two reasons. First, as plan participants in Bethlehem's pension plans, REBCO's members have an interest in a strong and well-financed Pension Benefit Guaranty Corporation (PBGC). The failure of the Court of Appeals for the Second Circuit to enforce the Restoration Notice issued by the PBGC transfers the enormous burden of LTV Corp.'s pension plan terminations to other pension plan sponsors, including Bethlehem. This failure to enforce the Restoration Notice jeopardizes the financial health of the insurance program, and, in all likelihood, forcing yet another increase in PBGC insurance premiums.

Second, Bethlehem, as a major competitor of LTV Steel, has been and will continue to be adversely impacted by LTV's transfer of unfunded pension liabilities to the PBGC. LTV Steel has gained a sizable competitive edge against Bethlehem in the domestic and international steel markets by transferring responsibility for over two billion dollars in pension liabilities to the PBGC. Bethlehem is attempting to modernize and restructure facilities, but has not shed its pension liabilities onto the PBGC. Bethlehem continues to meet ERISA's minimum funding standards. Allowing LTV to convert the pension guaranty program into a federal bailout program for one steel manufacturer places in jeopardy Bethlehem's ability to fund adequately its pension plans, to the disadvantage of REBCO members and spouses.

STATEMENT

1. Our Coalition, REBCO, was officially incorporated in 1987 as the "Retired Employees' Benefits Coalition, Inc." We are a not-for-profit Pennsylvania corporation.

There are approximately 16,000 retired Bethlehem Steel SALARIED employees we represent: clerical & technical people, mill foremen, superintendents, plant managers, salesmen, corporate staff and management people. None of our members is represented by a union.

Bethlehem has a pension fund which in underfunded by approximately 800 million dollars. This underfunding places in jeopardy pension payments to our members. Sustained profitability is a "key" element for the elimination of Bethlehem's underfunded pension plans. Sustained profitability will be more difficult for Bethlehem to achieve so long as LTV Steel enjoys labor costs advantages in part derived from having dumped certain employee benefits onto PBGC.

Bethlehem has labor costs greater then LTV Steel because, in large part, LTV Steel dumped certain retirement costs on the Federal Government.

From 1987 through early 1989, demand for steel has been relatively high. In such an environment, LTV has had no real need to use its cost advantage to maintain or increase its market share. However, today, the decrease in demand gives an unfair cost advantage to LTV Steel and gives LTV Steel considerable pricing flexibility to reduce prices and maintain its market share to the detriment of Bethlehem and other steel companies which have continued to meet their pension obligations. This is particularly unfair and unwarranted when the ability of LTV Steel to afford the restored plan has been demonstrated by the PBGC.

2. REBCO members and spouses depend on their Bethlehem pension payments on a day-to-day basis. The retirees invested time with their company. They retired with the expectation of receiving **promised** benefits. Bethlehem retirees, spouses, and fellow retirees of other basic steel producers, deserve fairer treatment than an undermining of these benefits.

Action by LTV Steel to renege on prior promises and contracts made in good faith, especially where it concerns essential employee benefits, should not be allowed to continue.

Retirees are different. They are individuals, not corporate entities. They have a planned reliance on retirement benefits — for which they worked a lifetime. These benefits must not be easily or quickly washed away.

The fear and harm of lost benefits affect not just Bethlehem retirees, but all retirees — within and without the steel industry — who have been promised benefits upon which they have planned their retirement years.

Retiree pension benefits are not a luxury; they are central to the well being of retired Americans. Fairness dictates that retirees be treated equitably and in good faith by their former employer and by our laws.

3. Salaried Bethlehem retirees do not have the collective strength of a union. They cannot strike their former employer to protect earned pensions. To whom shall salaried Bethlehem retirees look to protect earned pension benefits? They look, in part, to Congress, to PBGC, and to our judicial system.

4. The Court Appeals for the Second Circuit's decision undermines Congressional policy and elevates LTV Steel's interest over that of plan participants in the context of restoration. The requirement placed on the PBGC to demonstrate long term financial stability before restoration of a terminated plan shifts the burden Congress assigned to the employer in the distress provisions.

Not only does the decision impair the PBGC's administration of the pension insurance system, but it relegates plan participants, including REBCO members and spouses, to a position subservient to LTV Steel. The decision of the Court of Appeals minimizes the interests of plan participants that Congress plainly sought to protect. Rather than require the employer ineligible for distress termination to continue a pension plan during a period of financial uncertainty, plan participants must suffer the loss of promised pension benefits until the PBGC establishes that it is certain the employer will be able to fund the plan into the foreseeable future. The decision is thus fundamentally at odds with the clearly articulated Congressional policy requiring the employer to fulfill pension promises to plan participants until the employer demonstrates the severe hardship necessary for distress termination.

SUMMARY OF ARGUMENT

1. PBGC acted within its authority when it restored the LTV plans as a remedy for the establishment of abusive follow-on plans.

2. PBGC has broad authority to restore terminated plans when necessary to block abuse.

3. The Court of Appeals restricted PBGC's authority by an egregious misuse of legislative history.

4. The PBGC's policy against abusive follow-on plans derives from its expertise and experience with the operation of the federal insurance program. Follow-on plans undermine the statutory limitations on the PBGC's guarantee and eliminate its insurable event — plan termination. They divert insurance funds — intended to be used to provide basic benefits to workers at plan termination — to subsidize an employer's ongoing operations and benefit programs. By eliminating the adverse consequences associated with termination, follow-on plans make invocation of the federal guarantee an irresistible alternative for financially troubled employers and thereby threaten the solvency of the insurance program. The parties most at risk are the plan participants, including retirees and spouses.

5. PBGC's exercise of its discretion was not precluded by Congress and was not unreasonable. The Court of Appeals should not have substituted its judgement for that of the agency to which Congress expressly delegated restoration authority.

6. Restoration of the Plans was proper because each of the financial circumstances that had necessitated termination had changed. This decision was one that the agency, in light of its expertise and experience, was particularly well-equipped to make.

CONCLUSION

The decision of the Court of Appeals should be reversed and PBGC's restoration of the Plans should be enforced.

Respectfully submitted,

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Attorneys for Amicus Curiae,
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Coalition, Inc. (REBCO)

December 14, 1989

No. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 14, 1989

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No. 89-390

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE AMERICAN SOCIETY OF PENSION ACTUARIES TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The American Society of Pension Actuaries (ASPA) hereby moves the Court pursuant to Supreme Court Rule 36.1 for leave to file the accompanying brief as *Amicus Curiae* in support of Petitioner.

In support of the motion, ASPA states as follows:

1. Both PBGC and LTV have given written consent to the filing of a brief by ASPA; however, ASPA has not had the opportunity to contact the other parties in this case. Consequently, this motion is necessary.

2. ASPA is a non-profit corporation established under 501(c)(6) of the Internal Revenue Code. ASPA has roughly 3,000 members nationwide, who provide actuarial, consulting, and administrative services to approximately 30 percent of the qualified retirement plans in the United States. A substantial number of these plans are single-employer defined benefit plans and thus subject to the PBGC single-employer insurance program, which is the subject matter of this case.

3. ASPA is an interested party because a decision upholding the conclusion of the Second Circuit Court of Appeals would result in higher PBGC premiums and thus negatively impact the single-employer defined benefit pension system. The preservation of this pension system is of vital concern to our members and is critical to our country's ability to provide adequate retirement income.

4. We believe our extensive experience in the operations of single-employer defined benefit plans in general, and the operations of PBGC in particular, enables us to provide this Court with valuable information.

WHEREFORE, ASPA respectfully requests leave to file the accompanying brief as *amicus curiae*.

Dated: December 14, 1989

Chester J. Salkind, Counsel
American Society of Pension Actuaries
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QUESTIONS PRESENTED

1. May a reviewing court vacate a restoration decision under Section 4047 of ERISA because PBGC failed to defer to policies underlying the bankruptcy and labor laws?

2. May a reviewing court substitute its judgment for PBGC's as to the appropriate standard for restoration on the basis of improved financial circumstances?

3. May a reviewing court substitute its judgment for PBGC's as to the appropriate procedures to be followed in informal adjudication?

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN SOCIETY OF PENSION ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Society of Pension Actuaries submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States in support of the petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 875 F. 2d 1008. The appeal was taken from the judgment of the United States District Court for the Southern District of New York dated September 13, 1988.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on May 12, 1989. PBGC timely filed its Petition for Writ of Certiorari on September 11, 1989, and this Court granted the Writ on October 30, 1989.

STATEMENT OF THE CASE

LTV Corporation (LTV) sponsored three defined benefit plans (Plans) subject to the PBGC single-employer insurance program. In December 1986, LTV advised PBGC that it was unable to continue to fund these Plans. PBGC's internal working group estimated that the $2.1 billion in the Plans' underfunding would increase substantially unless the Plans were immediately terminated. With LTV's consent, the Plans were terminated by PBGC effective January 13, 1987. The Court of Appeals for the Second Circuit upheld the termination of the Plans against the challenge of the United Steel Workers of America (USWA) and noted that PBGC could restore the Plans if subsequent events justified such action. *Jones & Laughlin Hourly Pension Plan v. The LTV Corp.*, 824 F.2d 197, 202 (2d Cir. 1987).

On September 22, 1987, the Executive Director of PBGC issued a Notice of Restoration for these Plans based on LTV's establishment of follow-on plans and its financial improvement. The United States District Court for the Southern District of New York vacated the Notice of Restoration and PBGC appealed. The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court and PBGC filed a timely appeal from that decision.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Society of Pension Actuaries (ASPA) is a non-profit organization with about 3,000 members who provide actuarial, consulting, and administrative services to approximately 30 percent of the qualified retirement plans in the United States. A substantial number of these plans are single-employer defined benefit plans subject to the PBGC termination insurance program. It is our view that a decision against PBGC in the instant case would have a substantial negative effect on the PBGC single-employer insurance program and on the defined benefit pension system in general.

The immediate impact of a decision adverse to PBGC would be that PBGC would be responsible for about an additional $2 billion in unfunded liabilities of the Plans. PBGC could attempt to recover 75 percent of this amount from LTV, but historically such recoveries have been very limited. Accordingly, PBGC would lose, at a minimum, approximately 1/2 billion dollars if the Plans are not restored. Since the single-employer insurance program is primarily funded by premiums from participating employers, it is apparent that a premium increase would ultimately be necessary to cover this cost and the cost of similar cases. By way of background, it should be noted that when PBGC first began operations in 1974, the premium was $1 per participant. Plan sponsors now pay a premium of between $16 and $50. Thus, there has already been a very significant increase in the premium expense for sponsors of voluntary single-employer defined benefit plans.

In recent years, there have been many difficulties confronting defined benefit plans, which provide the most secure retirement benefits to employees. Single-employer defined benefit plans cover approximately 30 million individuals. In recent years, the laws affecting the defined benefit system have been changed with great frequency and sponsors of such plans have been confronted with substantially increased compliance and administrative costs. As a result, the percentage of American workers covered under defined benefit plans has decreased significantly in the 1980s. An increase in PBGC premiums

resulting from a decision adverse to PBGC in this case would aggravate this situation and make it more difficult for the private pension system to provide adequate retirement benefits.

There is another aspect of this case which is very disturbing--the standard for statutory construction that has been utilized by the Court of Appeals for the Second Circuit. In its discussion of the merits the Second Circuit stated, "Although this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight." The Second Circuit stated further that "PBGC focused inordinately on ERISA." ASPA submits that such a standard for statutory construction is not only legally inappropriate, but will also produce significant practical difficulties both for PBGC and other government agencies, and for the public who must deal with these agencies. Rather than accept the clear meaning of a statute, which is not in conflict with other statutes, the Court of Appeals has employed a convoluted process which attempts to ascertain the purposes of statutes not under consideration in its review of the application of the pertinent statute to the facts in the instant case. It is critical for the proper functioning of our legal system that judgments be made with reasonable certainty as to the meaning of a statute. The standard employed by the Court of Appeals would inject a huge degree of uncertainty into any effort to make a determination as to the authority of PBGC or of any government agency. Such uncertainty would be severely disruptive to the efforts of PBGC and other government agencies to administer federal statutes, and of the public to comply with them since, utilizing the Court of Appeal's standard, courts could construct unanticipated interpretations without regard to the clarity of any specific statute.

SUMMARY OF ARGUMENT

A. PBGC HAS BEEN GRANTED BROAD AUTHORITY TO RESTORE PLANS UNDER ERISA § 4047 AND IT IS INAPPROPRIATE TO REQUIRE DEFERENCE TO POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

B. IT IS INAPPROPRIATE FOR THE SECOND CIRCUIT COURT OF APPEALS TO SUBSTITUTE ITS JUDGMENT FOR PBGC'S AS TO THE APPROPRIATE STANDARD FOR RESTORATION ON THE BASIS OF IMPROVED FINANCIAL CIRCUMSTANCES.

C. A GOVERNMENT AGENCY SHOULD BE ACCORDED SIGNIFICANT LATITUDE AS TO THE APPROPRIATE PROCEDURES USED IN INFORMAL ADJUDICATION, BARRING A VIOLATION OF FUNDAMENTAL FAIRNESS. THE RECORD OF THIS CASE DOES NOT INDICATE THAT THERE HAS BEEN SUCH A VIOLATION.

ARGUMENT

A. PBGC HAS BEEN GRANTED BROAD AUTHORITY TO RESTORE PLANS UNDER ERISA § 4047 AND IT IS INAPPROPRIATE TO REQUIRE DEFERENCE TO POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

Congress has expressly granted to PBGC broad authority to restore terminated plans. Section 4047 of ERISA states:

> In the case of a plan which has been terminated under section 4041 or 4042, the corporation, [PBGC], is authorized <u>in any such case in which the corporation, [PBGC], determines such action to be appropriate and consistent with its duties</u> under this title [Title IV of ERISA], to take such action as may be necessary to restore a plan to its pretermination status....

[Emphasis added]. The above statutory language clearly provides PBGC with broad authority to restore a plan if such action is appropriate and consistent with its duties under ERISA. Two of its specific duties, as provided in Section 4002(a), are to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, and to maintain premiums established by PBGC under Section 4006 at the lowest level consistent with carrying out its obligations under this title.

In a situation such as this one, where the available financial evidence indicates a change for the better in the financial circumstances of the plan sponsor, it is clearly appropriate and consistent with its duties for PBGC to restore the plan in order to minimize its financial burden, and thus keep premiums at the lowest possible level. Such restoration would also serve to encourage the continuation and maintenance of voluntary pension plans by reducing the potential burdens of higher premiums on plan sponsors at a time when such sponsors are already required to pay premiums which have increased significantly and when such sponsors also face a myriad of other problems resulting from changes in the pension laws.

Thus, PBGC clearly has the authority to restore the Plans in this situation.

The Second Circuit Court of Appeals stated, "Because ERISA, bankruptcy and labor law are involved in the case at hand, there must be a showing on the administrative record that PBGC, before reaching its decision, considered all of these areas of the law, and, to the extent possible, honored the policies underlying them." The Court of Appeals stated further, "In the instant case, a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other. Rather, PBGC focused inordinately on ERISA. This failure renders PBGC's decision arbitrary and capricious."

This is not a case in which there is a direct conflict between two statutes, which might justify the utilization of such an ambiguous standard of statutory interpretation. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984). It is noted that the Court of Appeals did not hold that there was a violation of any provision of the bankruptcy or labor laws in PBGC's actions. Thus, the emphasis on the policies of other laws is unprecedented and improper in this situation.

The application of the standard utilized by the Second Circuit would result in great cost and confusion to both administrative agencies and the public. It would require that any administrative agency carefully consider and document every major area of law that could conceivably relate to its actions. Not only would this require incomprehensible amounts of time and financial resources on the part of the agencies, but it would create tremendous difficulties for those affected by agency actions to determine with any degree of certainty the appropriate scope of authority of any particular agency.

B. IT IS INAPPROPRIATE FOR THE SECOND CIRCUIT COURT OF APPEALS TO SUBSTITUTE ITS JUDGMENT FOR PBGC'S AS TO THE APPROPRIATE STANDARD FOR RESTORATION ON THE BASIS OF IMPROVED FINANCIAL CIRCUMSTANCES.

The Second Circuit Court of Appeals accepted a change in financial circumstances as an appropriate basis for plan restoration, but replaced PBGC's standard with one of its own--the "long term ability" of a company to fund its plan. The standard enunciated has no basis in ERISA, and is inconsistent with the principle that an agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). More specifically, this Court stated in *Chevron* that a court must accept an agency's interpretation unless "the interpretation is expressly foreclosed by a clearly expressed legislative intent." Therefore, while statutory construction of an ambiguous statute is the function of the courts, its power to review an agency determination is limited. Where an agency administering a statute has determined the question of the specific application of a broad statutory term, that decision is to be accepted by the courts if it is reasonable. Furthermore, the long term ability to fund standard interferes with the "type of judgment which administrative agencies are best equipped to make." *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). It should be noted that PBGC has been analyzing the financial condition of plans and employers since 1974 and has determined that the kind of long-term predictions required by the Second Circuit Court of Appeals cannot be made on a reliable basis.

By August of 1987, PBGC determined that the financial factors on which it had relied in terminating the Plans had significantly changed. Among these factors cited by PBGC were that the steel industry was experiencing a dramatic financial turnaround, contrary to the predictions of experts in late 1986, and information submitted by LTV to its creditors indicated that LTV had substantially exceeded its business projections of operating income. Additionally, the establishment of follow-on plans by LTV at a substantial cost provided strong additional evidence of changed financial circumstances. These factors clearly indicate that PBGC's restoration of the Plans, on the basis of changed financial circumstances, was an appropriate one.

The PBGC has argued that there is yet another standard for restoration, what it terms the "abusive follow-on plans" standard. We believe this argument that "abusive follow-on plans" constitute a separate basis for restoration is misguided. It is our view that the establishment of follow-on plans provides evidence of changed financial circumstances and is not a separate standard for restoration. Rather, it should be viewed as subsumed in the changed financial circumstances standard. For example, in another case, a follow-on plan may involve a minimum expenditure of funds of the plan sponsor and there may be no other factors indicating a favorable change in financial circumstances. We do not believe that restoration would be reasonable in such a situation since the available evidence would not provide any indication that the plan sponsor would be able to fund the plan. In the instant case, however, there is ample evidence of changed financial circumstances, including the establishment of follow-on plans involving significant costs.

C. A GOVERNMENT AGENCY SHOULD BE ACCORDED SIGNIFICANT LATITUDE AS TO THE APPROPRIATE PROCEDURES USED IN INFORMAL ADJUDICATION, BARRING A VIOLATION OF FUNDAMENTAL FAIRNESS. THE RECORD OF THIS CASE DOES NOT INDICATE THAT THERE HAS BEEN SUCH A VIOLATION.

The Second Circuit Court of Appeals concluded that the procedures employed by PBGC to reach its restoration decision rendered the decision arbitary and capricious.

Section 4047 of ERISA does not prescribe any procedures to be followed by PBGC when reaching a restoration decision. Furthermore, this Court stated that imposing "rigid requirement[s] ... would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise." 332 U.S. at 202. This Court also stated that "if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored

to reach what the court perceives to be the 'best' or 'correct' result, judicial review will be totally unpredictable." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978). Thus, this Court has recognized that agencies should be provided a significant degree of latitude in formulating their procedures, as long as the procedures employed are fundamentally fair. Applying this principle to the instant case, this Court should not reject PBGC's procedures on an arbitrary and capricious standard since the record does not reflect a failure to adhere to fundamental standards of fairness.

CONCLUSION

This Court should reverse the decision of the Second Circuit Court of Appeals and uphold PBGC's restoration of the Plans.

Respectfully Submitted,

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(19)

NO. 89-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* WHEELING-PITTSBURGH STEEL CORPORATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS*

Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") is currently litigating issues with petitioner, the Pension Benefit Guaranty Corporation ("PBGC"), that parallel the issues presented in this case. *In re Wheeling-Pittsburgh Steel Corp.*, 103 Bankr. 672 (Bankr. W.D. Pa. 1989) (recommended opinion pending before district court). The *Wheeling-Pittsburgh* case involves the PBGC's

*Pursuant to Supreme Court Rule 36.2, Wheeling-Pittsburgh Steel Corporation is filing its brief as amicus curiae with the consent of all the parties. Copies of letters indicating that consent are being filed with the Clerk simultaneously with this brief.

assertion that it has authority under section 4047 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1347, to restore terminated pension plans based on the subsequent implementation of new plans designed to ease the hardships of termination on pension recipients (commonly referred to as "follow-on" plans).[1]

Wheeling-Pittsburgh's plan terminations, formulation of follow-on plans, and institution of litigation against the PBGC occurred prior to the *LTV* case. As a result, Wheeling-Pittsburgh's plan terminations are governed by the version of section 4047 in effect prior to the Single Employer Pension Plan Amendments Act of 1986 ("SEPPAA"), Pub. L. No. 99-272, tit. XI, 100 Stat. 237, while LTV's terminations are governed by the post-SEPPAA provision. The language of the pre-SEPPAA provision, and other distinctions between *LTV* and *Wheeling-Pittsburgh*, make *Wheeling-Pittsburgh* a more difficult case for the PBGC than *LTV*. These more difficult issues are not directly before the Court because delay in the *Wheeling-Pittsburgh* litigation has allowed the *LTV* case to move ahead of *Wheeling-Pittsburgh*.

In their briefs to this Court, the PBGC and various amici have attempted to invoke Wheeling-Pittsburgh's plans as an example of

[1]The term "follow-on" plans was coined in the Termination Agreements negotiated between the PBGC and Wheeling-Pittsburgh in June 1986. After initial strenuous objections to any hardship payments to Wheeling-Pittsburgh's retirees, the PBGC agreed in these Termination Agreements to accept the termination of Wheeling-Pittsburgh's former defined benefit plans and to permit temporary follow-on arrangements in the form of voluntary employees' beneficiary associations ("VEBAs"). *See* 26 U.S.C. § 501(c)(9). These VEBAs provided payments supplemental to PBGC guarantees, equivalent to the payments proposed in Wheeling-Pittsburgh's permanent follow-on plans. Pursuant to the Termination Agreements, any permanent follow-on plan was subject to PBGC approval or to the determination of a federal district court that such follow-on plans are permissible under ERISA. The temporary VEBA arrangements remained in place until June 1989, when the district court granted injunctive relief, over the PBGC's objections, allowing Wheeling-Pittsburgh to implement its permanent follow-on plans pending resolution of its litigation with the PBGC.

the type of "abusive" follow-on plans that supposedly will proliferate unless the Court grants the PBGC the broad section 4047 powers it seeks. *See, e.g.*, Brief for the United States as Amicus Curiae at 16. The PBGC's and amici's suggestion that Wheeling-Pittsburgh followed LTV's example, and that other plan sponsors will follow suit, ignores the fact that the *Wheeling-Pittsburgh* matter arose prior to *LTV* and that the predicted proliferation of follow-on plans has not materialized.

Moreover, the PBGC and amici have failed to explain to this Court that, with full knowledge of both *Wheeling-Pittsburgh* and *LTV*, Congress rejected the PBGC's broad-based objections to follow-on plans. Congress addressed the PBGC's concerns not by banning follow-on plans designed to help the pension recipients that ERISA is intended to protect, but rather by assuring that terminations triggering the PBGC's insurance guarantees are limited to circumstances involving true financial need. By taking these steps, Congress precluded any use of ERISA's plan termination procedures as a ruse to "dump" liability on the PBGC. Thus, the very policy concerns cited by the PBGC in its backdoor attempt to establish judicially the authority it was denied by Congress have been resolved by legislative action.

The *Wheeling-Pittsburgh* case has been stayed by the district court pending this Court's consideration of *LTV*. Wheeling-Pittsburgh's interest in this case, therefore, is two-fold. First, it is imperative that the Court's opinion be informed by the full development of the follow-on plan issue, beginning with the pre-SEPPAA context in which the *Wheeling-Pittsburgh* case arose and culminating with Congress' rejection of the restoration authority sought by the PBGC. Second, the differences between the *LTV* and *Wheeling-Pittsburgh* cases should be clearly delineated, to preclude any inadvertent determination by this Court of the separate issues raised in *Wheeling-Pittsburgh*. The following description of the complete development and legislative history of the follow-on plan issue addresses both concerns.

SUMMARY OF ARGUMENT

The PBGC has attempted in this case to transform section 4047 of ERISA — a narrow provision empowering the PBGC to restore certain terminated plans when an employer's financial circumstances have improved — into a carte blanche to enforce its broad-based policy objections to follow-on plans. The United States Court of Appeals for the Second Circuit, affirming the district court, has held that section 4047 does not grant the PBGC such wide-ranging and essentially unreviewable authority. That decision should be affirmed.

The PBGC's opposition to follow-on plans undermines the bedrock principle underlying ERISA: that employees are entitled to rely on the pension promises of their employers. The language and legislative history of section 4047 do not constitute a license for the PBGC to frustrate this fundamental goal of ERISA. Nothing in ERISA prevents insolvent employers, forced to terminate their plans, from fulfilling that part of their pension promises not covered by PBGC guarantees.

As initially drafted, the text of section 4047 was limited to plans involuntarily terminated by the PBGC. The legislative history of section 4047 confirms that it was enacted for a narrow purpose: to allow the PBGC to reverse its prior involuntary termination decisions when the employer's or plan's financial circumstances have improved. Indeed, if Congress had intended section 4047 as a vehicle to address follow-on plans, it would have enacted a provision empowering the PBGC to deal with follow-on plans in routine, employer-initiated voluntary terminations. Thus, the language and legislative history of section 4047, as initially drafted, conflict with any notion that section 4047 empowers the PBGC to object to follow-on plans.

Although subsequent amendments extended authority to the PBGC to restore voluntarily terminated plans, Congress did not alter the touchstone of restoration authority — improvement in financial circumstances. Moreover, Congress' express rejection of anti-follow-on plan legislation underscores Congress' consistent policy

that the bailout of the PBGC should not be at the expense of retirees relying on promised pension benefits. The PBGC's bootstrap attempts to justify its deprivation of nonguaranteed retirement benefits as an inducement to maintain plans turns the title IV guarantee of pension benefits on its head.

Thus, the PBGC's exercise of restoration authority is clearly inconsistent with congressional intent. Under this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, it is for the courts and not the PBGC to determine congressional intent on the basis of the clear language and legislative history of section 4047. Based upon this language and legislative history, the Second Circuit's decision denying restoration of LTV's former defined benefit pension plans should be affirmed.

ARGUMENT

I.

THE PBGC'S FOLLOW-ON PLAN POLICY CONTRAVENES THE UNDERLYING PURPOSE OF ERISA: FULL PAYMENT OF PROMISED BENEFITS

As this Court has recognized, "[o]ne of Congress' central purposes in enacting [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980). According to the Court, "Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — he will actually receive it." *Id.* at 375.

A "major part of Congress' response to the problem" was the termination insurance program administered by the PBGC. *Id.* That program guarantees payment of vested benefits up to maximum limitations established by statute. *See* ERISA § 4022(b), 29 U.S.C.

§ 1322(b). However, ERISA's protection of the *full* benefit expectations of plan participants, many of whom rely heavily or exclusively on promised benefit income for sustenance in their later years, does not stop with PBGC guarantee payments. In recent years, the PBGC has successfully fought to establish the right of participants in terminated plans to seek payment from employers for vested plan benefits not covered by PBGC guarantees. ***See Murphy v. Heppenstall Co.***, 635 F.2d 233 (3d Cir. 1980), ***cert. denied***, 454 U.S. 1142 (1982).

In *Murphy*, the PBGC filed an amicus brief that echoes the position of Wheeling-Pittsburgh and LTV in this case:

> Title 29 U.S.C. § 1362 clearly limits the statutory liability owed by an employer to the PBGC for the pension benefits that are insured by Title IV of ERISA. ERISA, however, establishes only "***minimum standards*** for the regulation of private retirement systems . . ." ***Keller v. Graphic Systems of Akron***, 422 F. Supp. 1005, 1007 (N.D. Ohio 1976) (emphasis added). It does not impose a cap on the payment of other benefits. ***Consequently, an employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA.***

Brief for Amicus Curiae Pension Benefit Guaranty Corporation at 3, *Murphy v. Heppenstall Co.*, Nos. 80-1690, 80-1794 (3d Cir. 1980) (emphasis added). The court agreed, holding:

> ERISA established "minimum standards" for pension payments due retired employees. Congress endeavored to guarantee retirees at least a portion of the payments a terminated pension plan would have afforded. ***It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself.***

635 F.2d at 239 (emphasis added).

The PBGC's concern for full payment of promised benefits, however, has not carried over from ***Murphy*** to its evolving, ad hoc position concerning follow-on plans. In the ***Wheeling-Pittsburgh*** and

LTV cases, the PBGC has sought to avoid its insurance obligations by restoring (in *LTV*) or threatening to restore (in ***Wheeling-Pittsburgh***) these companies' terminated plans.[2] Ironically, the PBGC has based this action on a determination that Wheeling-Pittsburgh's and LTV's follow-on plans come too close, in partnership with PBGC guarantee payments, to fulfilling these companies' pension promises. Fulfillment of pension promises, however, is the very purpose of the insurance system, as recognized by this Court in ***Nachman***.

This disregard for the benefit promises made to retirees is not only inconsistent with the PBGC's position in ***Murphy***, but also is not presaged from earlier expressions of agency policy. Prior to ***Wheeling-Pittsburgh***, the only published PBGC determination concerning follow-on plans was a 1981 opinion letter. ***See*** PBGC Opinion Letter 81-11 (May 11, 1981), Petitioner's Appendix at 159a. However, that opinion letter dealt with the attempt of a ***solvent*** employer to terminate its defined benefit plans and immediately institute replacement defined benefit plans that, together with PBGC guarantee payments, replicated the prior plans.

Putting aside the propriety of the PBGC's interpretation of section 4047 in that opinion letter, which does not carry the force of law, PBGC Opinion Letter 87-7 (July 21, 1987), nothing in that letter could have put Wheeling-Pittsburgh or LTV on notice of the PBGC's subsequent policy positions. Opinion Letter 81-11 does not suggest that a follow-on plan implemented by an employer in financial distress, in the form of a defined contribution plan falling short of a complete makeup of prior benefits, could be considered an "abuse" of the insurance system. Nor did the PBGC's former policy

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[2] The PBGC also sought a legislative enactment to forbid employers from establishing follow-on plans within five years of terminating an underfunded plan. Initially adopted in committee, the PBGC's proposal was rejected by Congress as a whole in favor of other measures to foreclose the abuses predicted by the PBGC. These measures did not create the hardships for retirees that would be caused by banning follow-on plans. Congress' explicit policy choice provides further evidence of the conflict between the PBGC's position and the legislative intent the PBGC is bound to uphold. ***See infra*** pp. 22-25.

result in any deprivation of promised benefits, since the employer involved could afford full funding of its prior plans.[3]

Thus, the PBGC's policy against follow-on plans undermines the very purpose of ERISA because it *prevents* employers from making good on their promises to pay pension benefits. As is shown below, nothing in ERISA authorizes the PBGC to depart from this fundamental goal of ERISA. Congress' intent, which is the cornerstone of any judicial review of administrative action, is to allow employers in financial distress to terminate their plans, while simultaneously allowing measures to ensure, to the extent possible, that plan beneficiaries are not deprived of the vested benefits upon which they have relied for their retirement.

II.

THE PBGC'S AUTHORITY TO RESTORE TERMINATED PLANS IS SUBJECT TO JUDICIAL REVIEW

The asserted statutory authority for the PBGC's attempt to avoid payment of its insurance obligations is section 4047 of ERISA, 29 U.S.C. § 1347. Based on that section, which authorizes restoration of certain terminated pension plans,[4] the PBGC forces employers who must terminate their plans, if they are to survive, into an impossible predicament: either refrain from implementing follow-on plans that come close to making employees whole for promised benefits lost as a result of the termination,[5] or face restoration of the former plans these employers no longer can afford to fund.[6]

The PBGC argues that section 4047 must be read to give it authority that is, by its own description, "exceptionally broad." Brief for Petitioners at 20. Ignoring the provision as a whole, the PBGC argues that it is entitled under section 4047 to restore any terminated pension if *it* "determines such action to be appropriate and consistent with its duties under [title IV of ERISA]." In fact, the PBGC asserts that this grant of "exceptionally broad" authority is so apparent from the face of the statute that any resort to legislative history to determine Congress' true intent is unnecessary. *Id.*

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[3]Any application of the PBGC's position to terminations by insolvent employers would be contrary to the intent of Congress, expressed consistently since the enactment of ERISA in 1974. *See infra* note 14 (indicating that Congress' concern about abuses was limited to tranfers of liability by solvent employers, and addressing that concern not by authorizing plan restoration, but rather by making employers liable to the PBGC for plan underfunding up to specific net worth limitations). Moreover, in light of the ERISA provision requiring the PBGC to treat a plan amendment transforming a defined benefit plan into a defined contribution plan as a *per se* termination of the former plan, ERISA § 4041(e), 29 U.S.C. § 1341(e), Opinion Letter 81-11 gave no indication that the PBGC would consider a defined contribution plan to be a "continuation" of a former defined benefit plan.

[4]Upon the passage of SEPPAA, Congress expanded the scope of plan terminations to which section 4047 applies. *See infra* pp. 12-22.

[5]The PBGC suggests that some follow-on plans may fall far enough short of the goal of providing employees all of their promised benefits so as not to be "abusive." *See* Brief of Petitioners at 7. However, having failed to issue any regulations, guidelines, or other prospective guidance, the PBGC does not specify how much of the benefits promised to retirees must be denied before a plan passes muster under its test. The legislative proposal advocated by the PBGC concerning follow-on plans, *see supra* note 2; *infra* pp. 22-25, seems to indicate that, as long as retirees suffer the deprivation of nonguaranteed vested benefits for five years, the PBGC would have no objection to the implementation of identical makeup defined benefit plans in year six.

[6]Restoration clearly *is* appropriate if improved financial circumstances have made an employer capable of resuming funding, altering the prior justification for involuntarily terminating a plan, or voluntarily terminating a plan under the "distress" criteria added to ERISA by SEPPAA. *See infra* pp. 12-22. Because these considerations do not apply to Wheeling-Pittsburgh, which voluntarily terminated its plans prior to SEPPAA, and because Wheeling-Pittsburgh is not able to address LTV's financial ability to undertake full funding of its former plans, Wheeling-Pittsburgh does not address the PBGC's argument that an improvement in LTV's financial circumstances independently justifies its restoration action.

As this Court recognized in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the first step in reviewing any such claim to unfettered agency discretion is to employ "traditional tools of statutory construction" to determine whether the claim is consistent with an ascertainable congressional intention. *Id.* at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.[7]

The PBGC's superficial analysis of section 4047 hardly uncovers the intent of Congress. This Court has repeatedly recognized a "strong presumption that Congress intended judicial review of administrative action." *E.g., Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). This presumption in favor of judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Traynor*, 108 S. Ct. at 1378 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).[8]

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[7]More recently, the Court applied this principle to invalidate an attempt by the Federal Reserve Board to extend its authority, similar to the PBGC's action in this case, through an expansive statutory interpretation contrary to clear indications of congressional intent. *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

[8]This rule of law serves the purpose, articulated in a recent article by Professor Cass Sunstein, of allowing courts to avoid statutory interpretations that lead to "irrational" outcomes, such as when "a statute might be understood as giving open-ended authority to a bureaucracy." Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407, 439 (1989); *see also Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) (noting the need to avoid any statutory construction that would give an "open-ended grant" of power to an administrative agency). Such judicial review, according to Professor Sunstein, is especially important when the agency's self-interest is at stake, as the PBGC's pecuniary interests are in this case. As Professor Sunstein notes, "[b]road delegations of power to regulatory agencies have been allowed largely on the assumption that courts would be available to ensure fidelity to whatever statutory directives have been issued." *Id.* at

The PBGC's assertion that it has the exclusive power to determine when restoration is permissible is, in effect, a claim that courts have no authority to review the PBGC's decisions to determine if they were, in fact, "appropriate and consistent with [the PBGC's] duties under [title IV of ERISA]." Nothing cited by the PBGC, and nothing in the language or legislative history of section 4047, provides "clear and convincing" evidence that Congress intended to immunize the PBGC's restoration decisions from judicial review. If Congress had wished to make PBGC restoration decisions unreviewable by courts, it would have made that intent clear when it enacted section 4047.

Indeed, if section 4047 were so "exceptionally broad" as to give the PBGC exclusive, unreviewable authority to restore a plan whenever it determines that action to be "appropriate" and "consistent" with ERISA, that provision could not pass constitutional scrutiny under the nondelegation doctrine. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 408-09 (1928). As this Court confirmed just last Term, any attempt by Congress to grant authority to an administrative agency without providing an "intelligible principle" defining the scope of that authority would constitute an unconstitutional transfer of legislative duties to an unelected executive agency. *Mistretta v. United States*, 109 S. Ct. 647, 654 (1989); *see also American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring).

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446 (citing *Crowell v. Benson*, 285 U.S. 22, 42-46 (1932)). To allow agencies "to decide the meaning of a law whose scope is so directly relevant to agency self-interest," such as a decision as to "whether agency jurisdiction extends to new or unforeseen areas," would be equivalent to allowing "foxes [to] guard henhouses." *Id.* Thus, in such circumstances, courts must act as "independent arbiter[s]" to determine the limitation of the agency authority in question. *Id.*

The usual contemporary application of the nondelegation doctrine is not to invalidate legislative enactments, but rather to adopt "narrow constructions of statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 109 S. Ct. at 655 n.7 (citing *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 646 (1980), and *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 342 (1974)). This principle applies with particular force to the PBGC's "exceptionally broad" reading of its restoration authority. Under the nondelegation doctrine, section 4047 must be interpreted by ascertaining the "intelligible principle" through which Congress intended to circumscribe the PBGC's authority. As the following discussion of the language and legislative history of section 4047 conclusively demonstrates, Congress' delegation of authority does not encompass the use of restoration as a weapon to prevent the implementation of follow-on plans.

III.

RESTORATION OF TERMINATED PLANS TO PROHIBIT IMPLEMENTATION OF FOLLOW-ON PLANS CONTRAVENES CONGRESSIONAL INTENT, AS REFLECTED IN THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4047

A. As Enacted, Section 4047 Was Explicitly Limited to the Restoration of Involuntarily Terminated Plans, Consistent With Its Narrow Purpose of Addressing Changes in Financial Circumstances

Congress' intent with respect to section 4047, as originally enacted in 1974, is apparent from the plain language of that provision:

> When the corporation [*i.e.*, the PBGC] determines that *a plan which is to be terminated, or which is in the process of being terminated*, under this subtitle should not be terminated as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated. In the case of ***a plan which has been terminated under section 4042***, the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this title, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

ERISA § 4047, 29 U.S.C. § 1347 (1982) (emphasis added).

Pre-SEPPAA plan termination procedures, in effect from 1974 until 1986 (and thus governing Wheeling-Pittsburgh's, but not LTV's, plan terminations), gave employers the unilateral right to terminate their plans voluntarily under ERISA § 4041. *See PBGC v. Heppenstall Co.*, 633 F.2d 293, 296 (3d Cir. 1980). The PBGC was given no discretion to reject such voluntary terminations. *See id.* As long as employers were willing to suffer the financial consequences of such voluntary terminations — payment of up to 30 percent of their net worth to defray the cost of unfunded vested benefits, ERISA § 4062(b), 29 U.S.C. § 1362(b) (1982)[9] — they were free to terminate their plans.

By the same token, in the absence of any statutory authority to reject voluntary terminations *ab initio*, section 4047 gave the PBGC no authority to restore such voluntarily terminated plans. Rather, section 4047 applied only to "a plan which is to be terminated, or which is in the process of being terminated" (a description that could

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[9]This provision was strengthened by Congress in SEPPAA and the Pension Protection Act of 1987 ("PPA"), Pub. L. No. 100-203, tit. IX, subtit. D, pt. II, subpt. B, 101 Stat. 1330-333, to increase the percentage ceiling on employer liability, and eventually to eliminate it altogether. *See* ERISA § 4062(b), 29 U.S.C. § 1362(b) (1982 & Supp. IV 1986) (post-SEPPAA provision); ERISA § 4062(b), 29 U.S.C. § 1362(b) (1988) (post-PPA provision); *infra* note 18.

not apply to a section 4041 termination at that time since the termination was accomplished through the mere filing of a notice) or "a plan which has been terminated under section 4042." *See* ERISA § 4047, 29 U.S.C. § 1347 (1982) (quoted above). The plain language of section 4047, therefore, limited the PBGC's restoration authority to only a small subset of plan terminations — those instituted involuntarily by the PBGC.

The PBGC's insistence that section 4047 is a broad statutory mandate to police the myriad of pension arrangements implemented subsequent to plan terminations cannot be squared with the limitations of this statutory language. Clearly, if Congress had intended section 4047 as a vehicle to implement the PBGC's follow-on plan policy, section 4047 would have included voluntary terminations from the very beginning, empowering the PBGC to deal with follow-on plans in routine employer-initiated terminations. The fact that Congress did not enact such an expansive provision is compelling evidence that the eradication of follow-on plans was not an intended goal of restoration under section 4047.

The PBGC seeks to avoid this result by distorting the pre-SEPPAA version of section 4047. The PBGC bases its argument on an unsupported assertion that, prior to SEPPAA, "section 4042 was the sole statutory vehicle for both voluntary and involuntary terminations of pension plans." Brief of Petitioners at 22 n.15. However, as the PBGC well knows, ERISA has always provided two mechanisms by which plans can be terminated — voluntary terminations initiated by employers under section 4041 of ERISA, 29 U.S.C. § 1341, and involuntary terminations initiated by the PBGC under section 4042, 29 U.S.C. § 1342. The fact that the pre-SEPPAA version of section 4041 referred to certain ministerial duties of the PBGC under section 4042, *see* ERISA § 4041(c), 29 U.S.C. § 1341(c) (1982), does not alter the fact that the decision as to *whether* to terminate a pension plan voluntarily belonged exclusively to the employer. *See PBGC v. Heppenstall Co.*, 633 F.2d 293, 296 (3d Cir. 1980). Indeed, if the PBGC were correct in its contention that a termination initiated by an employer under section 4041 is in fact a termination "under section 4042," it would render

the words "under section 4042" in the original version of section 4047 superfluous, contrary to "the elementary canon of construction" forbidding statutory interpretations that render words in a statute meaningless. ***Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana***, 472 U.S. 237, 249 (1985).[10]

If any further evidence of the limitation of section 4047 were needed, that evidence was unmistakably provided in the legislative history of ERISA. The key passage from that legislative history, which the PBGC quoted but did not fully analyze, underscores the limited ambit of the PBGC's restoration authority:

> Neither the House bill nor the Senate amendment had any specific provision that procedures against a plan in the termination phase might be abandoned by the corporation if the employer and plan enjoyed a favorable reversal of business trends, or if some other factor made termination no longer advisable.

[10] In the ***Wheeling-Pittsburgh*** case, the PBGC filed an answer to Wheeling-Pittsburgh's declaratory judgment complaint admitting that Wheeling-Pittsburgh's voluntarily terminated plans were terminated "under section 4041." *See* Answer, ¶ 32. Moreover, when it was to its advantage to do so, the PBGC successfully argued before the United States Court of Appeals for the Third Circuit that a voluntary termination under the pre-SEPPAA version of ERISA occurs "under section 4041." *In re Syntex Fabrics, Inc. Pension Plan*, 698 F.2d 199 (3d Cir. 1983). That case involved a dispute as to the termination date for an underfunded plan. If the voluntary termination were considered to be pursuant to section 4041, one mechanism for determining the termination date applied, while a different mechanism applied if termination were considered to be pursuant to section 4042. The court agreed with the PBGC that the voluntary termination occurred pursuant to section 4041, holding that "[w]hile section [4041] requires that PBGC 'commence proceedings in accordance with the provisions of section [4042]' when the sufficiency of the [voluntarily terminated] plan's assets are in doubt, ***this directive does not change the character of the termination itself.***" *Id.* at 203 (emphasis added). Having "successfully and unequivocally asserted a position in a prior proceeding" the PBGC should not be allowed to maintain an inconsistent position in this case. *Edwards v. Aetna Life Insurance Co.*, 690 F.2d 595, 598 (6th Cir. 1982).

> Under the conference substitute, the corporation may cease any termination activities and do what it can to restore the plan to its former status. As a result, a terminated plan being operated by a trustee as a wasting trust may be restored if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent. The corporation may, when appropriate, transfer to the employer or plan administrator part or all of the remaining assets and liabilities.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5157-58, *and in* 3 ERISA Legislative History 4277, 4645-46 (1976) (quoted in Brief for Petitioners at 22). This explanation indicates, consistent with the language of section 4047, that Congress' concern was limited to "procedures *against* a plan in the termination phase" (i.e. involuntary terminations). The fear expressed by Congress was that, without a provision such as section 4047, the PBGC might decide to exercise its discretion to institute involuntary termination proceedings against a plan, and subsequently discover that a change in financial circumstances had made that termination "no longer advisable."

The PBGC relies on the Conference Committee's reference to "some other factor" as an open-ended invitation to restore terminated plans for any other reason the PBGC can ascertain. Brief of Petitioners at 22. The context of the Committee's statement, however, indicates that this could not have been the intent of Congress. Rather, the only reasonable interpretation of the reference to "some other factor" is that improvements in an employer's or plan's financial circumstances could arise from factors other than "a favorable reversal of business trends." For example, if a plan's fortunes improved as a result of investment experience providing assets sufficient to fund vested benefits under the plan, the PBGC would have authority to restore the plan. However, the touchstone of the PBGC's discretion to determine that its initial involuntary termination decision is "no longer advisable" remains the financial condition of the employer and the plan.

Thus, the original language of section 4047 provided the PBGC with restoration authority only with respect to plans it originally decided to terminate. Congress' explanation of section 4047 indicates that the purpose of this provision, thus limited, was to give the PBGC a chance to change its mind if the adverse financial circumstances prompting its initial action had improved. Therefore, absent an improvement in a plan's or plan sponsor's financial circumstances, the PBGC's reliance on section 4047 to enforce its broad-based policy against follow-on plans derives no support from the language or legislative history of that provision.

B. As Amended by SEPPAA, Section 4047 Did Not Extend Authority To Restore Plans in Retaliation for the Implementation of Follow-on Plans

Unlike Wheeling-Pittsburgh, LTV's plan terminations are governed by the provisions of ERISA, including section 4047, that were amended by the enactment of SEPPAA in 1986.[11] In SEPPAA, Congress altered the procedures governing plan terminations under ERISA. Most significantly, Congress replaced the former section 4041, which allowed employers to terminate their plans voluntarily "simply by filing a notice," *see supra* pp. 13-14, with a procedure requiring employers terminating underfunded plans to demonstrate compliance with certain "distress criteria." ERISA § 4041, 29

[11] This difference in applicable law, which is particularly significant because Wheeling-Pittsburgh's plans (unlike LTV's) were voluntarily terminated and thus not subject to restoration under the pre-SEPPAA version of section 4047, is not the only distinction between the *LTV* and *Wheeling-Pittsburgh* cases. For example, the PBGC has recognized that Wheeling-Pittsburgh's follow-on plans are defined contribution plans. As such, the payments to retirees under these plans are subject to risks of performance by Wheeling-Pittsburgh, investment of plan assets, and other variables. In addition, the issue of financial improvement, asserted by the PBGC as a separate basis for restoration in *LTV*, is not present in the *Wheeling-Pittsburgh* case. To the extent these distinctions may affect the Court's analysis, Wheeling-Pittsburgh respectfully requests that the Court make explicit the limitations of its holding.

U.S.C. § 1341 (1982 & Supp IV 1986). By limiting the right to terminate underfunded plans to cases of demonstrated financial need, Congress ensured that termination is the option of last resort. Moreover, by giving the PBGC authority to determine, under this new procedure, when an employer had sufficiently demonstrated financial distress, Congress for the first time gave the PBGC discretion with respect to acceptance of terminations it did not initiate under section 4042.

In light of this new grant of discretion, Congress also made a conforming amendment to the restoration authority granted to the PBGC under section 4047. Because a change in circumstances could affect the PBGC's exercise of discretion with respect to a termination under the newly-defined "distress" criteria just as easily as it could affect an involuntary termination, Congress amended section 4047 to allow the PBGC to take restoration action with respect to a plan "which has been terminated under *section 4041 or* section 4042." ERISA § 4047, 29 U.S.C. § 1347 (emphasis added).

However, although SEPPAA expanded the universe of terminated plans as to which the PBGC could exercise its restoration authority, the legislative history of SEPPAA confirms that this amendment did not expand the substantive grounds supporting such an exercise. To the contrary, Congress intended only to preclude employers who could afford their plans from transferring liabilities to the PBGC. At the same time, Congress preserved the right of employers in financial distress to terminate their plans, while simultaneously taking steps to recognize and to provide for the benefit needs of their employees and retirees.

The House Committee on Education and Labor, for example, explained the purpose of SEPPAA as follows:

> Most of the claims against the insurance program have been associated with business failures. However, a significant portion of claims has come from ongoing companies . . . . *The Committee believes that the law should be revised to prevent claims against the insurance program from ongoing companies that are financially able to fund the guaranteed benefits in their plans.* . . .

H.R. Rep. No. 241, part 2, 99th Cong., 1st Sess. 28 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 686 (emphasis added). Similarly, the Senate Committee on Labor and Human Resources explained:

> The essential reform accomplished by this package is a narrowing of the "funnel" into the Pension Benefit Guaranty Corporation (PBGC). Under the terms of this bill *plan sponsors that demonstrate distress* (a "distress" termination) *will still be permitted to transfer their plan liabilities to the PBGC.* . . .

S. Rep. No. 146, 99th Cong., 1st Sess. 451 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News at 42, 410 (emphasis added).[12]

These Committees also reaffirmed Congress' continued commitment to ensuring, "whenever possible, that participants and beneficiaries receive all benefits under the terms of the plan." H.R. Rep. 241, part 2, 99th Cong., 1st Sess. 28 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 685, 686. With this in mind, Congress enacted legislation whose "basic policy . . . is to limit the ability of plan sponsors to shift liability for guaranteed benefits onto

[12]The Committee also stated: "For those plan sponsors that, of necessity, undergo a "distress termination," the provisions of this bill grant the PBGC an enhanced ability to recover the asset insufficiency that is 'dumped' on the system. . . . Taken *in toto*, these provisions will enable the PBGC to recover more than current law permits against those fewer plan sponsors that are permitted to dump on the insurance system." S. Rep. No. 146, 99th Cong., 1st Sess. 451 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 410. This increase in employer liability to the PBGC, in addition to the restriction of voluntary terminations to cases of "financial distress," was another means by which Congress sought to ensure that abuses of the system were avoided while at the same time preserving the right of employers experiencing extreme economic difficulties to terminate their plans notwithstanding the continuation of their businesses. *See infra* note 18.

other PBGC premium payers and to avoid responsibility for the payment of certain nonguaranteed benefits to cases of severe business hardship." *Id.*[13] It would be inimical to this full payment principle, *see supra* pp. 5-8, to allow the PBGC to prevent employers from taking measures, on their own, to ensure that plan participants receive their promised benefits.

Thus, the only relevant restoration inquiry for the PBGC remains whether the plan's or employer's circumstances have improved to the point that the employer is now "financially able to fund the guaranteed benefits in [its] plans." *Id.* Congress sanctioned the reversal of a previous termination decision only when the prior finding of financial "distress" is no longer warranted.[14]

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[13]In furtherance of this continued commitment to full payment of all benefit promises, including those not covered by PBGC guarantees, Congress added a new provision in SEPPAA to increase the safeguards against loss of nonguaranteed benefits. Under this provision, the PBGC must appoint a trustee for payment of these excess benefits. The employer is liable to this trustee, in addition to its liability to the PBGC for asset insufficiency. ERISA § 4062(c), 29 U.S.C. § 1362(c). The purpose of this provision, according to the legislative history, "is to ensure that the contributing sponsors and members of their controlled groups do not evade responsibility for paying benefits which have been earned by participants and beneficiaries, but which are not guaranteed by the PBGC or otherwise paid by the plan." H.R. Rep. No. 300, 99th Cong., 1st Sess. 301 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 756, 952. The PBGC's opposition to follow-on plans undermines the very objective — employer responsibility for the difference between PBGC guarantee payments and benefit promises — that Congress attempted to achieve through this provision.

[14]The legislative history of ERISA, as originally enacted, also reflects Congress' concern about "abuses" of the insurance system, and the limitation of that concern to solvent employers. At that time, Congress responded to this concern by enacting a provision that made plan sponsors liable to the PBGC, up to 30 percent of net worth, upon termination of their plans. In explaining this provision, Senator Harrison Williams, the original Senate sponsor of ERISA, stated:

> Since there would be a possibility of abuse *by solvent employers* who terminate a plan and shift the financial burden to the insurance program, ***notwithstanding their own financial ability to continue funding the plan***, the conference bill imposes liability

The PBGC ignores this extensive legislative history, and instead focuses on a single sentence from a floor statement by Senator Don Nickles that allegedly supports the PBGC's follow-on plan policy. However, the PBGC omits the context of this quotation:

> I expect that the Corporation will block . . . abuses of the new termination rules under title IV by using its authority under section 4047 to negate pending or completed plan terminations and restore plans to their pretermination status. ***Specifically, the Corporation may negate terminations under section 4041(c) or section 4042 whenever the Corporation determines that a principal purpose of an act, failure to act or transaction undertaken by the contributing sponsor — or any member of its controlled group — was to enable such person to satisfy any of the distress criteria in section 4041(c)(2)(B) or to compel the Corporation to institute termination proceedings under section 4042, thereby decreasing the liability to the PBGC or avoiding the obligation to provide all benefit commitments under the plan.***

132 Cong. Rec. 4887 (statement of Sen. Nickles) (emphasis added).

Senator Nickles' stated concern was that a financially healthy company, not otherwise able to meet the tests for financial "distress," would abuse the insurance system by taking steps to circumvent the financial distress standards, thereby avoiding "the obligation to provide all benefit commitments under the plan." *Id.* Senator Nickles' statement thus reinforces the overall policy behind SEP-

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> on employers whose plans terminate, to reimburse the program for benefits paid by the corporation. This liability extends to 30 percent of the employer's net worth.

120 Cong. Rec. S15737 (daily ed. Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5185 (emphasis added). In SEPPAA and the PPA, Congress progressively tightened this provision to increase, and eventually to eliminate, the net worth limitation on the PBGC's recovery. ERISA § 4062(b), 29 U.S.C. § 1362(b); *see also supra* note 12. Nothing in this or any other amendment to ERISA, however, indicates that Congress changed its view and determined that terminations by employers in true financial distress could be "abusive."

PAA — that termination insurance should be limited to cases of genuine financial distress. There is no suggestion, however, that Senator Nickles equated "abuse" with the implementation of follow-on plans by employers in genuine financial distress. To the contrary, Senator Nickles' concern with providing "all benefit commitments under the plan" reaffirms Congress' commitment to the fundamental full payment principle of ERISA, which the PBGC's policy undermines.[15]

C. The PBGC's Policy Against Follow-on Plans Has Been Rejected by the Explicit Action of Congress

In the absence of any explicit or implicit legislative authority to interfere with follow-on plans implemented by employers in finan-

[15] If any further confirmation of Congress' intent were needed, it was provided less than a year after Congress' enactment of SEPPAA, in the legislative history accompanying the PPA. During consideration of a proposal banning implementation of follow-on plans within five years after termination of an underfunded plan, *see infra* pp. 22-25, the House Ways and Means Committee provided the following description of "present law":

> *Replacement Plans*. Under present law, an ongoing entity can continue in operation on a profit-making basis after transferring liability to the PBGC and without being liable for the amounts paid by the PBGC to plan participants. Similarly, *an employer, after terminating a plan in a distress termination, may continue or attempt to establish a plan that provides retirement benefits to employees. Such a plan may be designed to provide the same benefits as the terminated plan less the benefits paid by the PBGC*. The committee does not believe that the pension insurance system was intended to permit employers to shift liability of ongoing retirement programs to the PBGC. Similarly, the PBGC should not be liable for an employer's pension responsibilities if the employer is able to continue to provide retirement benefits.

H.R. Rep. No. 391, 100th Cong., 1st Sess. 1010, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1, 2313-627 (emphasis added). In light of the Conference Committee's deletion of the proposed replacement plans provision, the "present law" described by the Ways and Means Committee, which is consistent with prior congressional explanations, continues to govern the scope of plan termination authority in general and the PBGC's restoration authority in particular.

cial distress, the PBGC turned to Congress for yet another amendment. Congress' rejection of that proposal emphatically demonstrates that the PBGC's objection to follow-on plans contradicts Congress' intent, and therefore cannot be justified as "appropriate and consistent with [the PBGC's] duties under [title IV of ERISA]."

The amendment advocated by the PBGC would have precluded the establishment of follow-on plans providing "substantially similar benefits" within five years of terminating an underfunded plan.[16] Such a provision was included in the initial version of the PPA produced by the House Ways and Means Committee, which was enacted by the House of Representatives. H.R. 3545, 100th Cong., 1st Sess., § 9532(e), *reprinted in* 133 Cong. Rec. H9185, H9325 (daily ed. Oct. 29, 1987).[17]

[16] The Ways and Means Committee was asked to consider legislation under which, "[e]xcept to the extent permitted by the PBGC, an employer (and its controlled group) would be precluded from establishing retirement programs which, in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits." *The Administration's Proposal on the Funding and Termination of Defined Benefit Pension Plans* at 18 (Feb. 1987).

[17] The House version would have added a new subsection (e) to section 4062 of ERISA, 29 U.S.C. § 1362, providing:

> PROHIBITION OF FUTURE BENEFITS WHERE ALL LIABILITIES TO CORPORATION NOT SATISFIED. —
>
> (1) IN GENERAL. — Except to the extent permitted by the [PBGC], if a single-employer plan is terminated with unfunded guaranteed benefits and all liabilities with respect to such termination under subsection (b) are not satisfied, it shall be unlawful for any person described in subsection (a), at any time during the period described in paragraph (3) —
>
> (A) to establish an arrangement under which retirement benefits are provided, or
>
> (B) to provide for further accruals of retirement benefits under any arrangement previously established.
>
> For purposes of the preceding sentence, the term "arrangement" shall not include any multiemployer plan.
>
> (2) AUTHORITY TO ENJOIN VIOLATION. — The

The Senate version of the PPA, however, did not include any provision forbidding follow-on plans. Instead, the Senate version continued to strengthen the restrictions limiting pension insurance to cases of genuine financial need, while at the same time ensuring that participants in terminated plans are not required to suffer unnecessary deprivations of promised benefits.[18] Congress enacted the Senate version of the PPA, and rejected the House version, which would have given the PBGC authority to implement the very policy it seeks to vindicate in this case. *See* H.R. Conf. Rep. No.

[PBGC] may bring an action to enjoin any violation of paragraph (1). Subsection (c) of section 4070 shall apply to any such action in the same manner as if such action were brought under section 4070.

(3) PERIOD DURING [WHICH] PROHIBITION APPLIES. — The period described in this paragraph is —

(A) the 5-year period beginning on the termination date, and

(B) to the extent provided in regulations, the 1-year period ending on the termination date.

[18]Congress enacted numerous changes in SEPPAA and the PPA in response to the PBGC's concerns about potential abuses of the insurance system. *See, e.g.*, ERISA § 4041, 29 U.S.C. § 1341 (amended in SEPPAA and the PPA to limit employers' rights to terminate plans voluntarily to cases in which "financial distress" can be demonstrated to the PBGC); ERISA § 4062(b), 29 U.S.C. § 1362(b) (amended in SEPPAA and the PPA to increase, and eventually to eliminate, the net worth limitation on employers' liability to the PBGC for termination of an underfunded plan); ERISA §§ 307, 4068, 29 U.S.C. §§ 1085b, 1368 (added and amended in SEPPAA and the PPA to tighten the security and lien rules applicable to underfunded plans, thus improving the position and priority of the PBGC's claims in bankruptcy proceedings); ERISA § 4006, 29 U.S.C. § 1306 (amended in SEPPAA and the PPA to grant significant premium increases to the PBGC to assure its ability to meet guarantee commitments arising from plan terminations triggered by financial distress). The cumulative effect of these revisions has been to foreclose the possibility of "gaming the system," used by the PBGC to justify its opposition to follow-on plans.

495, 100th Cong., 1st Sess. 885, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2313-1245, 2313-1631.[19]

Thus, the policy determination advanced by the PBGC for its attempted application of section 4047 has been rejected by the explicit action of Congress. The PBGC's attempt to circumvent that policy choice through the back door of section 4047 should not be upheld by this Court.

D. The PBGC's Justifications for Its Follow-on Policy Cannot Be Reconciled With Congressional Intent

In the face of this defeat in Congress, the PBGC seeks to rationalize its follow-on policy in two ways. First, the PBGC argues that the floodgates of termination would open if follow-on plans were allowed because the alleged "coinsurance" feature of the termination system would be removed. Second, the PBGC, which apparently views itself as guardian of "competitive balance" in the steel industry, argues that this balance would be upset if some bankrupt employers are permitted to terminate their plans and implement follow-on plans while other solvent employers do not follow suit. Brief of Petitioners at 28-30; *see also* Brief of Amici Armco, *et al.*

Of course, neither of these rationales is supported in the legislative history as a potential ground for a restoration decision.[20] Moreover,

[19]Although the PBGC attempts to dismiss this determination as mere congressional "inaction," *see* Brief of Petitioners at 24-25, it was much more than that. The proposal did not merely die in committee for reasons that cannot be ascertained. The Conference Committee was presented with a stark choice between two policy alternatives, and it rejected the alternative advocated by the PBGC and passed by the House of Representatives.

[20]The "coinsurance" policy is not a concept articulated by Congress, but rather is the invention of a PBGC employee. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989) (cited in Brief of Petitioners at 28). The legislative history relied upon by the PBGC to support this notion says nothing about discouraging plan terminations; it merely states that "there is an advantage in not fully covering all pension benefits in that this encourages those receiving larger benefits, and who are often in a

even if these policy concerns were relevant to restoration, they could not be reconciled with the policies established by Congress in enacting ERISA, which the PBGC is bound to uphold.

The PBGC's "coinsurance" notion, suggesting that unions and affected employees lack incentives to oppose plan terminations if follow-on plans are implemented, is divorced from economic and labor relations realities. Indeed, as the Brief for the United States as Amicus Curiae mentions, Wheeling-Pittsburgh suffered through a lengthy strike by the United Steelworkers of America when the pension issue first arose. Brief of United States as Amicus Curiae at 8.[21] In the years preceding the strike at Wheeling-Pittsburgh, and Wheeling-Pittsburgh's bankruptcy, the union already had accepted substantial wage and benefit reductions as concessions to help Wheeling-Pittsburgh through its economic difficulties. When Wheeling-Pittsburgh nonetheless was forced into Chapter 11 bankruptcy, it soon became apparent that the company would not be able to continue as a viable entity unless it achieved further reduc-

management position, to see to it that there is adequate funding of the pension plan." S. Rep. No. 383, 93d Cong., 2d Sess. 81, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4965 (cited in Brief of Petitioners at 28). Under the rules in effect at that time, a plan could be terminated just as easily with or without adequate funding; however, the shortfalls in insurance coverage gave the management employees who likely have input into the termination decision an incentive to push for adequate funding to cover their excess benefits if a termination does take place.

The competitive balance concern, moreover, is completely beyond the scope of the PBGC's mission as indicated by congressional intent. Congress did not create the PBGC to police the steel industry marketplace, or to carry out any other functions remotely related to economic regulation. The PBGC was created to administer the pension insurance system within the statutory authority given to it by Congress. *See* ERISA § 4002(a), 29 U.S.C. § 1302(a) (defining the purpose of the PBGC).

[21]The Brief of the United States erroneously attributes the strike to termination of Wheeling-Pittsburgh's plans. In fact, the plans were not terminated until after the strike was settled. The strike was triggered by Wheeling-Pittsburgh's demand for reductions in labor costs necessary to allow it to reorganize and continue as a viable entity.

tions in labor costs. Termination of its former plans was one such step necessary to ensure the company's survival.

The union did not easily accept the concessions required to save the company. The length and bitterness of the strike in which it engaged are proof of the union's resolve. Nonetheless, economic realities ultimately forced the union to accept termination of the plans, with certain measures to ease the hardship of that decision on union employees. In settling for these measures, the union had to satisfy itself with follow-on plans that are defined contribution plans (providing only payments from whatever assets are available from promised contributions) instead of its former defined benefit plans (promising specific benefits regardless of the cost of funding). Moreover, the union gave up other features of its former plans, such as disability and plant shutdown benefits. In light of these concessions, forced by unavoidable economic circumstances, it cannot reasonably be said that the union and Wheeling-Pittsburgh's employees did not suffer as a result of the plan terminations. *See generally* Brief of the United Steelworkers of America as Amicus Curiae.

The PBGC's concerns about competitive balance in the steel industry similarly lack any basis in reality. As amici Armco, *et al.* are well aware, the days of "pattern bargaining," in which steel companies negotiated labor agreements in lock step with one another and any single more favorable term in a collective bargaining agreement could be said to give that company a competitive advantage over the others, have long since passed. *See* J. Strohmeyer, *Crisis in Bethlehem: Big Steel's Struggle To Survive* 223 (1986) (quoting Lynn R. Williams, president of the United Steelworkers of America: "We don't see a pattern being set for an industry on the basis of a bankrupt participant . . . there are no level playing fields in this industry."). Although the PBGC and amici have asserted an economic advantage for Wheeling-Pittsburgh and LTV by looking at pension costs in isolation (an advantage that would be greater, not lesser, if Wheeling-Pittsburgh and LTV had not made the outlays necessary to fund follow-on plans), the extent to which the plan terminations have affected the competitive balance between Wheeling-Pittsburgh and LTV and their competitors is wholly speculative.

In any event, to the extent these terminations did have an effect on competition, that effect is a product of the termination system as Congress intended it to operate. Congress did not provide that a company must go out of business to terminate its plans. Rather, a company that can demonstrate financial distress can "dump [its liabilities] on the insurance system," S. Rep. No. 146, 99th Cong., 1st Sess. 451 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 42, 410; *see supra* note 12, and proceed with its attempts to reorganize and continue its business. Congress, in providing for this system (and, indeed, in allowing companies to reorganize under Chapter 11 bankruptcy), determined that the interest in preserving companies experiencing economic hardship, and in protecting the livelihood of employees and others who depend on these companies for their survival, justifies certain protections that are not extended to competitors in the marketplace. As much as those competitors would like to destroy these protections (at least until they find themselves in the same situation), the PBGC is not empowered to overturn the policy determinations of Congress.

The PBGC's asserted grounds for restoration, therefore, cannot be considered "appropriate and consistent with [the PBGC's] duties under [title IV of ERISA]," as informed by the expressed intent of Congress. Congress' extensive explanations of ERISA repeatedly confirm that implementation of follow-on plans by insolvent employers to assure that retirees, to the extent possible, receive the benefits they were promised is not only not an "abuse" of the insurance system, but in fact furthers the goal of full satisfaction of benefit commitments that Congress envisioned when it enacted ERISA. The PBGC is allowed to restore a terminated plan only when it finds that its former determination that the employer is not able to fund its plan is no longer valid because of improvement in the terminated plan's or the employer's financial circumstances. Absent such an improvement, the PBGC is not authorized to use restoration to implement policy determinations that Congress has rejected.

CONCLUSION

The PBGC must not be allowed, through an "exceptionally broad" interpretation of section 4047, to accomplish a result that contravenes the purposes of ERISA and the intent of Congress. ERISA's purpose of protecting *all* the benefit expectations of plan participants would be defeated by a policy that would prevent insolvent employers from taking whatever measures they can afford to make up the benefit losses suffered by their employees as a result of plan terminations.

Congress has taken measures to prevent "abuses" of the system by solvent employers, but has refused to preclude implementation of follow-on plans by insolvent employers. Its explanation of that policy choice clearly indicates that follow-on plans implemented by employers in true financial distress do not constitute "abuses" of the system. The PBGC's attempted use of restoration to compel insolvent employers to refrain from implementing follow-on plans to ease the hardships suffered by their retirees, therefore, cannot be reconciled with the expressed intent of Congress.

Respectfully submitted,

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No. 89-390

In The
Supreme Court of the United States
October Term, 1989

Pension Benefit Guaranty Corporation,
Petitioner,
v.
The LTV Corporation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The American Federation of Labor and Congress of Industrial Organizations and the United Steelworkers of America, AFL-CIO, CLC jointly file this brief as *amici curiae* solely to address the following question:

Whether the adoption of a pension program that replaces some of the benefits lost by active and retired employees when the Pension Benefit Guaranty Corporation involuntarily terminated a defined benefit pension plan constitutes an "abuse" of the pension termination insurance program and provides a lawful basis for the PBGC to restore the terminated plan pursuant to Section 4047 of the Employee Retirement Income Security Act, 29 US.C. § 1347.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AS *AMICI CURIAE* SUPPORTING RESPONDENTS

This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 90 national and international unions with a total membership of approximately 14 million working men and women, millions of whom are covered by defined benefit pension plans that are subject to the statutory provisions involved in this case. The United Steelworkers of America, AFL-CIO, CLC ("USWA") is the union that negotiated the former defined benefit plans of respondent LTV Steel Company involved in this case. Those USWA plans covered some 20,000 active employees and some 45,000 retirees. After those plans were involuntarily terminated by petitioner Pension Benefit Guaranty Corporation, USWA and LTV negotiated the replacement benefit plan to which the PBGC objects in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The PBGC terminated two pension plans adopted as a result of collective bargaining between USWA and LTV. The PBGC then sought to undo that termination—restore the terminated plans—for two independent reasons. *First*, subsequent to the termination of the plans by the PBGC, USWA and LTV negotiated an employee benefit program designed to replace some of the benefits lost by retirees and employees as a result of the termination. The PBGC claims that this benefit program—which the PBGC calls a "follow-on plan"—constitutes an "abuse of the pension insurance program" to which restoration is a proper "response." Pet. Br. at 20. *Second*, the PBGC contends that restoration of the terminated plans

was justified because the financial "circumstances necessitating termination had changed." *Id.* at 32.

We take no position on the second issue—*viz.*, whether LTV had experienced such "financial improvement" that "there was no longer a financial basis for termination," *id.* The PBGC's position is that even in the *absence* of financial improvement, the adoption of a replacement benefit program such as the one at issue here constitutes a basis in and of itself for restoring a terminated plan. That is the contention we address in this brief.

As we will show, the PBGC has no business overseeing the kinds of benefit packages that a union and employer may adopt following a pension plan termination, and the adoption by collective bargaining parties of a replacement pension program affords no grounds for restoring a terminated plan.[1]

[1] The American Society of Pension Actuaries, in its brief *amicus curiae* in support of petitioner, agrees with our position that it is "misguided" for the PBGC to maintain that "'abusive follow-on plans' constitute a separate basis for restoration." ASPA Br. at 9. ASPA suggests, however, that "the establishment of follow-on plans," while "not a separate standard for restoration," may provide "evidence of changed financial circumsances." *Id.* We agree with that suggestion only in the sense that any expenditure a company undertakes, whether for pension programs or anything else, may cast light on the company's financial condition. Although, as stated, we take no position on the question whether LTV's finances had improved such that there was no longer a financial basis for termination, we submit that no real light is shed on that subject by LTV's adoption of the replacement benefit program at issue here. The adoption of that program constituted the settlement of a substantial contractual claim, *see infra* at 8, 27-30, and involved relatively small costs, particularly in view of the labor cost savings of $50 million per year that were achieved by LTV as part of the package, *see In re Chateaugay Corp.*, 89 Bankr. 779, 789 (S.D.N.Y. 1988), Pet. App. 45a.

The United States, as *amicus curiae*, also appears to part company with the PBGC's argument that the adoption of a "follow-on plan" constitutes a basis in and of itself for restoring a terminated plan. The United States' position is that "the findings [of financial capability] justifying restoration ought to vary depending on whether the employer has adopted an abusive follow-on plan." U.S. Br. at 24.

I.

1. The adoption of a replacement pension program did not add one penny to the liabilities the PBGC assumed as a result of its termination of the USWA/LTV pension plans. The Agency acknowledges that after a plan terminates, an employer who remains in business is generally free to allocate its available resources in the way that the employer considers most conducive to the success of its business, including the right to establish, through collective bargaining, new wage and benefit programs. But the PBGC argues that there is one limitation on that right: the benefits provided by any new pension plan may not be "substantially the same" as under the terminated plan. Although the PBGC is unable to define that standard with any precision, it is clear that the Agency's policy against "follow-on plans" seeks to prescribe the form (but not the cost) of the pension programs an employer and union may develop in collective bargaining after plan termination.

2. Nothing in ERISA suggests, much less specifies, that the sponsor of a terminated pension plan is disabled from negotiating any particular benefit package for its employees, including a "follow-on plan." Nor does the logic of the Act support such a theory.

Far from finding its source in the statute, the PBGC's policy turns ERISA on its head. Of all the wage and benefit programs an employer, or an employer and union, might adopt, a replacement pension program is the one most protective of the very interests ERISA is designed

According to the United States, where an employer has adopted such a plan the PBGC may order restoration unless there is a "significant chance of immediate retermination," while if such a replacement plan has not been instituted "the PBGC might reasonably decide to require greater evidence of financial improvement [before restoring the terminated plan]." *Id.* at 24-25. This suggestion falls somewhat short of the PBGC's single-minded approach, but as we will show, the United States' suggestion, which is made of whole cloth, still ascribes undue significance to the adoption of replacement plans as a factor in plan restoration. Our arguments responding to the PBGC's position apply equally to the United States' suggestion.

to promote. The statute's central objective is, after all, that employees and retirees should receive, to the greatest extent possible, the full pension benefits promised to them. Replacement pension programs are fully consistent with this statutory purpose; the PBGC's position is not.

3. The PBGC seeks to justify its action by asserting that if the replacement pension plan here is permitted, employers in *other* cases may rush to terminate their pension plans unnecessarily. This theory defies logic for two independent reasons. First, an employer *cannot* terminate an underfunded pension plan at whim. Congress has amended ERISA to ensure that an underfunded pension plan can be terminated only if the employer proves severe financial distress, or if the PBGC itself decides to terminate the plan.

Second, even if it were necessary or appropriate for the PBGC to be devising ingenious techniques to deter plans from terminating when the stringent termination criteria established by Congress are satisfied, the Agency's ban on "follow-on plans" is a uniquely ill-conceived means to that end. The PBGC's policy is founded on numerous unstated assumptions, none of which is discussed by the Agency, and all of which are counter-intuitive.

II.

The PBGC's application of its "follow-on plan" policy is all the more wrong in this case, because the adoption of the replacement plan here was a good-faith settlement of a substantial lawsuit filed by USWA seeking enforcement of its contractual right to the continued payment of benefits after the termination of the original pension plans. That lawsuit was based on provisions of USWA's and LTV's collectively bargained pension agreements creating rights that survive plan termination—rights which, as the PBGC itself has previously acknowledged, are not rendered unenforceable by ERISA. The PBGC completely ignored this fact in its restoration decision in this case.

ARGUMENT

I. THE PBGC'S POLICY ON "FOLLOW-ON PLANS" HAS NO BASIS IN THE STATUTE THE PBGC IS CHARGED WITH ADMINISTERING

A recurring theme in the PBGC's brief is that the replacement pension program here somehow *increases* pension liabilities that were "unload[ed] . . . on the PBGC," Pet. Br. at 30, and thus *increases* the "subsidy" LTV receives from the pension insurance program, *id.* at 29, and LTV's "competitive edge," Brief *Amicus Curiae* of *Armco, et al.*, at ii, 2, 3. We readily concede that if the situation were as the PBGC hypothesizes, the Agency's position would be rooted in relevant statutory concerns. But the replacement pension program did nothing to increase the PBGC's liabilities over what those liabilities would be in the absence of such a program, or to create any employer subsidy. Not surprisingly, because the PBGC's premise is fatally flawed, the conclusion the Agency would draw as to the propriety of the replacement pension program here has no basis in the underlying statute.

When the PBGC terminated the LTV/USWA pension plans, a consequence required by ERISA was that the pension insurance program administered by the PBGC assumed the obligation of paying some of the plans' benefits that had previously been the responsibility of LTV. Congress could, of course, have limited such a government assumption of liabilities to situations in which the employer goes out of business. Congress did not do so. Thus, like many employers whose pension plans have been terminated, LTV remained in business after the termination. In these circumstances, to the extent that the PBGC's pension insurance program is funding benefits to LTV's employees and retirees, it can be said that LTV is receiving a government "subsidy" for part of what had been the company's employment costs. That "subsidy" is a congressionally mandated consequence of the

PBGC's action in terminating the LTV plans, and is unaffected by whatever wage, benefit, or other program LTV might adopt subsequent to the termination.

After the termination, LTV, like any ongoing enterprise, had to allocate its available resources in the way the company considered most conducive to its business success. Among other things, the termination had a substantial adverse effect on LTV's employees and retirees. A critical question that naturally arose in this situation was what LTV and USWA, the employees' exclusive bargaining representative, were to do to meet the new situation that had been created by the termination.

It is the PBGC's position here that the one thing the collective bargaining parties were *not* free to do was to establish a new pension program, funded by LTV, that replaced some of the benefits lost by employees and retirees as a result of the termination. According to the PBGC, negotiating such a program constitutes an "abuse of the pension insurance program." Pet. Br. at 20. At the same time, the PBGC acknowledges that it would *not* have been an "abuse" of that insurance system for LTV, instead of creating a replacement pension program, to have put the *same amount of money* into some other pension program, or some other form of employee wage or benefit program, or, for that matter, to have put that money into any other form of corporate expenditure. *See infra* at 10-12. Yet the replacement program has *no* different effect than such other forms of expenditures on the PBGC's obligations or on LTV's "subsidy." In each instance, the effect is zero.

Accordingly, the issue with respect to what the PBGC calls "follow-on plans" has nothing to do with increasing either the PBGC's obligations or any employer "subsidy." Rather, the question is whether, after certain pension liabilities of an employer have been *properly assumed* by the PBGC as a result of a proper plan termination, the employer and union are disabled from negotiating a particular kind of replacement pension program, where that replacement program is entirely lawful and does not increase the liabilities assumed by the PBGC. It is our submission that the answer to that question is "no." The decision of labor and management as to the form of the wage and benefit package to be instituted following termination of a pension plan provides no basis for the forced restoration of that plan.

A. 1. It is important to understand precisely what is involved here. The PBGC terminated LTV's pension plans involuntarily under 29 U.S.C. § 1342. The reason for that action was that in "the depressed state of the steel industry," Pet. Br. at 34, the plans had become "severe[ly] underfund[ed]," *id.* The PBGC concluded that its potential long-term insurance liability, which then amounted to approximately $2.1 billion of the plans' $2.3 billion underfunding, was likely to increase over time if the plans were not terminated. *Id. See* JA 138-40.

As a result of the termination over 8,000 USWA retirees suffered an immediate, severe loss of monthly pension benefits; in some cases, the losses exceeded fifty percent of the retirees' income.[2] In addition, some 20,000 active USWA employees ceased to accrue further pension benefits or to earn retirement eligibility under the terminated plans. Pet. App. 42a-43a.

As the case now comes before this Court, the question whether that involuntary termination was proper is not presented, and it must therefore be taken as given that the PBGC's action in involuntarily terminating the plans was in accord with the applicable statutory criteria. Indeed, the PBGC has stated that although the termination was an involuntary one pursuant to 29 U.S.C. § 1342, LTV's financial condition was such that it "could probably have satisfied" even the stringent standards for

[2] As the district court noted, some of the most significant losses occurred because "[c]ertain early retirement, disability, and surviving spouse benefits . . . were terminated completely." Pet. App. 42a.

voluntary "distress" terminations now found in 29 U.S.C. § 1341(c).[3] The PBGC's determination that an involuntary termination was necessary meant, as a matter of law, that the PBGC would be required to assume the expense of the benefits guaranteed by ERISA, 29 U.S.C. §§ 1322(a), 1361, and that LTV would in turn be liable to the PBGC as provided by law, 29 U.S.C. § 1362.

Although LTV's plans had been terminated, and LTV had filed for reorganization under Chapter 11, LTV was, as we have noted, still a going concern, and USWA and LTV had to address the terms and conditions of employment that would apply during the pendency of the reorganization case. In addition, USWA had filed an adversary proceeding against LTV in the bankruptcy court, based on contract rights that were unaffected by the plan termination, *see infra* at 27-29, and seeking payment under the collectively bargained pension agreements of "pension benefits provided by [USWA's] collective bargaining agreements with LTV Steel but not guaranteed by PBGC." *In re Chateaugay Corp.*, 826 F.2d 1177, 1178 (2d Cir. 1987). The bankruptcy court had urged the parties to settle that contract suit.

[3] PBGC, *Promises at Risk* 32 (1987), *reprinted in PBGC Proposal to Initiate a Variable Rate Premium: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 40 (1987). *See infra* at 18-20. Nor is there any finding in this case that LTV had taken improper actions to force the involuntary termination. To the contrary, the district court distinguished this case from such a situation. Pet. App. 96a n.27. As that court noted, *id.*, the statement by Senator Nickles at 132 Cong. Rec. 4887 (1986), to which the PBGC refers at page 23 of its brief, referring to "abuse" as a ground for restoration of a plan, was directed at situations where an involuntary termination was improperly induced, and that is not the case presented here.

When the plans were terminated, USWA argued that the consent order effectuating the termination "was obtained in a procedurally deficient manner," *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 198 (2d Cir. 1987), because USWA had received no notice or information as to the basis of the termination, but that contention was rejected, *id.*

For these reasons, USWA and LTV negotiated a comprehensive new interim collective bargaining agreement. That agreement included the replacement plan at issue here, which was designed to make up for *some* (but not all) of the benefits that active and retired employees had lost as a result of the PBGC's termination of the prior plans. JA 163-67.[4] The adoption of the collective bargaining agreement, including the replacement plan, constituted a settlement of USWA's contract lawsuit, and was approved by the bankruptcy court as "clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor," JA 260.

The adoption of the replacement plan did not affect in any way the pension liabilities that the PBGC assumed as a result of the termination or LTV's resulting financial obligations to the PBGC. The benefits provided by the replacement plan are neither paid for nor guaranteed by the PBGC. Pet. App. 109a. Thus, the replacement plan did not increase the PBGC's obligations by one cent. Whatever the amount of "subsidy" or "competitive edge" that LTV has received as a result of *the PBGC's decision* to terminate the prior plans—a decision which, as indicated, is not challenged in this Court—that amount remained unchanged by the adoption of the replacement plan.

[4] The retirees' hardship had become so obvious to all concerned that in April 1987 all parties, including the PBGC, had consented to an order approving a "hardship" payment to retirees pending the outcome of negotiations between LTV and USWA. Pet. App. 44a. As the district court stated, the replacement plan that was subsequently negotiated filled the urgent need of providing retirement income for the "[t]housands of retirees who were solely dependent on pension benefits for food, clothing, housing and other essentials [but who] received substantially reduced pension benefits following termination," as well as the need to establish a replacement retirement program for the "[t]housands of current employees who had worked in return for a contractually guaranteed right to early retirement [but who] forfeited such benefits and stopped accrual of service for any pension plan" following termination. Pet. App. 42a-43a.

2. The PBGC does not dispute that it was permissible for LTV and USWA to negotiate a new collective bargaining agreement in the wake of the Chapter 11 filing and the involuntary termination of the plans. And the PBGC would *not* have claimed a right to restore the terminated plans if, for example, LTV, relieved of the financial burden of an underfunded pension plan, had increased wages for active employees, had made extensive capital expenditures for the company's future operations, or even had given a bonus to senior management. Indeed, the PBGC states that the Agency would have had no objection if LTV had established a new pension plan for active employees, no matter how rich in funding or benefits, as long as the benefits of the new plan were not "substantially the same . . . as if no termination had occurred." Pet. Br. at 7.

The Agency's test for distinguishing between permissible and impermissible replacement plans does *not*, in other words, turn on cost; indeed, the PBGC advised USWA and LTV that the Agency "does not care how much is contributed to a new plan" or what its total cost would be.[5] Nor does the PBGC care if the benefits of a new plan for active employees are "generous," JA 265.

Rather, the PBGC seeks to prescribe the particular *form* of pension benefits that an employer and union may negotiate after a plan has been terminated. It is not clear precisely what forms of benefits render a replacement plan "substantially the same" as a terminated plan in the PBGC's eyes. Indeed, despite the PBGC's claim that the USWA/LTV replacement plan was sufficiently similar to the terminated plans as to run afoul of the Agency's policy, both of the courts below found that there were fundamental differences between the old and new plans, and that "[n]owhere in the record is

[5] See the description of the PBGC's position in the letter from USWA President Lynn Williams to PBGC Deputy Executive Director Royal Dellinger, dated July 29, 1987, at 2, Exhibit H to the Declaration of Richard M. Seltzer, Dist. Ct. Docket No. 71 (Feb. 23, 1988).

there a showing that PBGC undertook an analysis of these differences." *PBGC v. LTV*, 875 F.2d 1008, 1017 (2d Cir. 1988), Pet. App. 19a; *In re Chateaugay*, 87 Bankr. at 819-20, Pet. App. 107a-109a.[6]

Although the PBGC has refused to specify precisely what its policy requires, the Agency advised USWA that it would be impermissible, for example, for a replacement plan to provide in any way for "disability benefits, widow's benefits, [or] benefits for victims of future [plant] shutdowns;"[7] and in its brief the PBGC states only that it "has never objected to employees earning new pension benefits *based solely on their post-termination service*." Pet. Br. at 7 n.8 (emphasis added). *See also* U.S. Br. at 6 n.4 ("The PBGC would not consider it abusive if, for example, an employer created new *defined contribution* plans *that did not differentiate among participants based upon their past service*" (emphasis added)); JA 265 (letter from PBGC Deputy Executive Director Royal Dellinger to USWA President Lynn Williams) ("PBGC would accept the establishment of a traditional, *future service, defined contribution* plan for *active* employees who are participants in the Plans") (emphasis added). Those statements leave no room for any kind of replacement plan for retirees (who by definition have no "post-termination service"),[8] and also preclude any effec-

[6] For example, the basic program for active employees under the replacement plan is a defined contribution rather than a defined benefit plan. *In re Chateaugay*, 87 Bankr. at 820, Pet. App. 109a. The plan is not protected by the PBGC insurance program, and each participant bears the risk that the Company will cease making contributions or that the contributions made will have a poor rate of investment return.

[7] Letter from Lynn Williams to Royal Dellinger, *supra* note 5, Dist. Ct. Docket No. 71.

[8] In an affidavit filed in the bankruptcy court, PBGC Executive Director Utgoff stated flatly that the PBGC opposes any replacement plan that "provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC." JA 229.

tive restoration of early retirement options for active employees.[9]

Whatever may be the precise contours of the PBGC's policy, it is clear that the policy seeks to prescribe the form (but not the cost) of the pension programs an employer and union may develop in collective bargaining following plan termination, even though the programs will have no effect on the amount of liability that flows to the PBGC as a result of the termination.

As we next show, the PBGC's policy on "follow-on plans" has no basis in ERISA. While that alone is sufficient to sustain the decision below, we would be derelict if we did not note two preliminary points.

First, the PBGC's policy means that in "distress termination" situations—*viz.*, situations in which an employer would in all probability be forced to liquidate if required to reassume its full funding obligations to its original pension plan, *see infra* at 19-20—employers and unions are put to the following Hobson's choice: either foregoing all possibility of negotiating plans that protect the interests of long-term employees and of retirees within the limits of the employer's resources, or attempting to meet that moral obligation at the risk of having the ongoing operation shut down and all current jobs lost.

Second, the PBGC's policy cannot be reconciled with the national labor policy in favor of free collective bargaining. As we have noted, the PBGC certainly has a

[9] Thus, the PBGC has stated as a hard and fast rule that a replacement plan may not "grant[] credit for purposes of benefit accrual . . . for service rendered under the terminated plan." JA 229. This rules out any replacement plan that seeks to restore a benefit such as the "30-and-out" pension in the terminated LTV plans. Under that provision employees could retire after 30 years of service without waiting until normal retirement age. By prohibiting a replacement plan from granting credit for service under the terminated plan, the PBGC would prevent a replacement plan from restoring this lost early retirement option in any way, even for an employee who was just one day short of completing his thirtieth year when the PBGC terminated the plans.

valid interest in assuring that where an employer which has terminated a plan reacquires financial health, the employer, and not the PBGC, pays the cost of the original plan's guaranteed benefits. Congress has provided the legal tools to assure that this obligation is satisfied, *see infra* at 14. But, as we have stressed, the PBGC's policy on "follow-on plans" goes well beyond such financial considerations. If approved, that policy would provide the Agency the authority to determine the composition of a wage-benefit package, the total cost of which the PBGC concedes is in no way improper. That approach unjustifiably trenches on Congress' determination that labor and management are ordinarily to be accorded "wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960).[10]

B. The PBGC's policy with respect to "follow-on plans" has no basis in ERISA's language, structure or legislative history. What is more, that policy is at war with that statute's central purpose. And, on its own terms, the policy rests on counterintuitive assumptions, which the Agency has not explained or even acknowledged.

1. One searches ERISA in vain for any condemnation of "follow-on plans." The statute specifies the consequences that are to flow from a plan termination: the PBGC is to pay certain guaranteed benefits, 29 U.S.C. §§ 1322(a), 1361, and the employer is to be liable in turn to the PBGC in specified amounts, *id.* § 1362. Nothing in the

[10] *See also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526 (1984) (in bankruptcy, as in other contexts, "the national labor policies of avoiding labor strife and encouraging collective bargaining . . . generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference"); *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980) (It "does not behoove a court to second-guess either that process or its products"). And, administrative agencies have been admonished not to intrude on the collective bargaining process where this can be at all avoided. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172-73 (1962).

statute even suggests, much less specifies, that the sponsor of a terminated plan is disabled from negotiating any particular benefit package for its employees, including a "follow-on plan".[11]

Nor does the logic of the Act suggest that the adoption of any particular kind of replacement pension program should result in the restoration of a terminated plan. Because the determination whether a plan is to be terminated turns on the plan's and the plan sponsor's financial condition, 29 U.S.C. §§ 1341(b)(2), 1341(c)(2)-(3), 1342(a), it stands to reason that the test for determining whether a terminated plan may be restored is: have the relevant financial conditions changed so that the plan can be made "sufficiently solvent." H. R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 378 (1974). That rationale cuts against the notion that a terminated plan should be restored merely because the employer and union have negotiated a replacement plan to make up some of the benefits lost as a result of the termination.[12]

Perhaps most to the point, ERISA's purposes and policies strongly suggest that an employer and union that seek to reestablish benefits to the limits of the available resources are acting properly, not improperly. Of all the wage or benefit programs an employer, or an employer and a union, might adopt, a replacement pension plan is

[11] Indeed, when the PBGC proposed such a provision, Congress declined to enact it. *See infra* at 22.

[12] *See* note 1 *supra* (discussing position of American Society of Pension Actuaries). For purposes of our argument it is not necessary to assert that financial improvement is the only factor the PBGC may consider in deciding whether to restore a plan under § 4047 of ERISA, although the legislative history points in that direction. *See* H.R. Conf. Rep. No. 93-1280, *supra*, at 378-79, We do maintain, however, that the logic of the statute dictates that restoration of a terminated plan must be predicated on a showing that the basis for the termination has been vitiated. Assuming *arguendo* that there may be factors other than financial improvement that would bear on that analysis—although we can conceive of none—for the reasons that we develop in our argument the adoption of a replacement plan is not such a factor.

the one most protective of the very interests ERISA is designed to promote. To select out such a program as an "abuse" of the statute is to turn ERISA on its head.

ERISA's fundamental purpose is to protect employees' expectations in the pension benefits they have earned and "to prevent 'the great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (quoting 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen)). As this Court explained:

> *Congress wanted to . . . mak[e] sure that if a worker had been promised a defined pension benefit upon retirement*—and if he has fulfilled whatever conditions are required to obtain a vested benefit—*he actually will receive it.* [*Id.* at 375 (emphasis added).]

By definition, the adoption of a replacement plan, which pays pension benefits that the PBGC does not guarantee, advances "the continued well-being and security of . . . employees and their dependents," 29 U.S.C. § 1001(a), and "increase[s] the likelihood that participants and beneficiaries . . . will receive their full benefits," *id.* § 1001b (c)(3). Thus, a replacement plan that provides for the payment of amounts that more closely approach an active employee's or retiree's "full benefits" than does the PBGC's limited guaranty can hardly be labeled an "abuse" of ERISA's pension termination insurance program.

To be sure, Congress placed limits on the levels of benefits that are guaranteed by the PBGC, in order to limit the PBGC's potential liability. 29 U.S.C. § 1322 (b); S. Rep. No. 93-383, 93d Cong., 1st Sess. 26 (1973). But Congress intended that the PBGC's pension guarantees would provide a *floor* below which pension benefits will not fall, *not* a ceiling above which they may not rise. *E.g.*, H.R. Rep. No. 100-391, 100th Cong., 1st Sess. 109 (1987) ("The PBGC guaranty program has always been merely a floor of protection for basic benefits."); 120 Cong. Rec. 4283 (1974) (statement of Rep. Gaydos); S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS

598 & n.218 (1988). *See also infra* at 28-29. Indeed, Congress has affirmatively sought to assure that active and retired employees will receive more than the minimum benefits that are guaranteed under the insurance program when a plan terminates.

Thus, in the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"),[13] which was in effect at the time of the termination of the USWA/LTV plans, Congress enacted ERISA § 4049, with the purpose of "ensur[ing that plan sponsors] do not evade responsibility for paying benefits which have been earned by participants and beneficiaries, but which are *not guaranteed* by the PBGC." H.R. Rep. No. 99-241, Pt. 2, 99th Cong., 1st Sess. 52-53 (1985) (emphasis added).[14] Subsequently, in the Pension Protection Act of 1987 ("PPA"),[15] which is now in effect, Congress expanded on these protections, repealing § 4049 and substituting in its place a provision requiring the PBGC to collect the full amount of the employer's liability for *all* promised benefits, guaranteed and non-guaranteed alike, and to "pay[] out a portion of unfunded benefit liabilities *in excess of unfunded guaranteed benefits* based on the total value of PBGC's recovery. . . ."[16] These enactments manifest Congress' intent

[13] Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986).

[14] Section 4049, 29 U.S.C. § 1349 (Supp. IV 1986), provided for the creation of a trust after every termination of an underfunded pension plan, for the purpose of collecting liability payments from the plan sponsor totaling up to 75 percent of all non-guaranteed benefits, in order to distribute the proceeds to participants. *See* 29 U.S.C. §§ 1349, 1362(c) (Supp. IV 1986).

[15] Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987).

[16] H.R. Conf. Rep. No. 100-495, 100th Cong., 1st Sess. 848 (1987) (emphasis added). Under the PPA, a plan sponsor and members of its controlled group are liable for the total amount of unfunded benefit liabilities, including liabilities for non-guaranteed benefits. 29 U.S.C. § 1362(a) (Supp. V 1987). In addition to paying benefits guaranteed under § 4022(a) and (b), *id.* § 1322(a) & (b), the PBGC is obligated to pay to participants a percentage of non-guaranteed benefits generally equal to the percentage of total liability recovered by the PBGC. *Id.* § 1322(c).

that to the extent possible retirees and employees should receive *all* of the pension benefits promised them, including benefits not guaranteed by the insurance program.

The USWA/LTV replacement plan, and replacement plans in general, are therefore entirely consistent with congressional intent. Such plans "increase the likelihood that participants and beneficiaries . . . will receive their full benefits." 29 U.S.C. § 1001b(c)(3). The PBGC's opposition to such plans contravenes that central legislative purpose.

2. Having failed to establish that the adoption of the replacement plan in *this* case was in any way contrary to the provisions or policies of ERISA, the PBGC proposes an alternative justification for its actions, based on the supposed danger that employers in *other* cases will rush to terminate pension plans unnecessarily. Thus, the Agency asserts that "[i]f follow-on plans are permitted, they will inevitably lead to additional terminations that would jeopardize the pension insurance program." Pet. Br. at 28-29. According to the PBGC, employees and retirees must suffer the certain loss of pension benefits when a plan terminates so that employees and unions will have the incentive to resist employer efforts to terminate pension plans. *Id.* at 28. Without the deterrent effect of this threatened loss of accrued pension benefits—which the PBGC euphemistically refers to as "coinsurance"[17]—the PBGC claims that more underfunded pension plans will be terminated. *Id.* at 29-30; *see also* U.S. Br. at 12. There is no merit to this contention.

[17] The term "coinsurance" is found nowhere in ERISA or its legislative history. The *only* source cited for this notion is a 1989 publication by R. Ippolito. Pet. Br. at 28; U.S. Br. at 5. Mr. Ippolito is Chief Economist at the PBGC and has held that job throughout the Agency's litigation with LTV. *See* PBGC, *Annual Report to the Congress: Fiscal Year 1988*, at 50; PBGC, *Annual Report to the Congress: Fiscal Year 1987*, at 57.

a. The PBGC's assertion that if "follow-on plans" are allowed, more underfunded pension plans will be terminated ignores ERISA's statutory scheme. Simply put, an employer *cannot* terminate an underfunded pension plan at whim. While an employer may have had such a right when the PBGC first adopted its policy against "follow-on plans"—specifically, at the time the PBGC issued the informal opinion letters upon which the Agency still so doggedly relies [18]—any such right was lost in 1986, when SEPPAA was enacted. By enacting SEPPAA Congress has now provided that an underfunded plan can be terminated only if the employer proves severe financial distress, or if the PBGC itself decides to terminate the plan.

(i) Congress enacted SEPPAA for the express purpose of limiting terminations of underfunded pension plans.[19] SEPPAA changed then-existing law, under which "plan sponsors [were] free to terminate their single-employer pension plans at any time (subject to any contractual limitations)," [20] and instead created two types of voluntary plan terminations—"standard terminations" and "distress terminations." [21]

As amended by SEPPAA, ERISA allows an employer "to terminate a plan in a standard termination only if the plan holds sufficient assets to pay all 'benefit commitments' under the plan," including benefits the PBGC does

[18] PBGC Opinion Letter 81-11, Pens. Rep. (BNA) No. 367 at R-3 (May 11, 1981), LEXIS, Labor Library, PBGC file (Pet. App. 159a); PBGC Opinion Letter (unpublished) (April 24, 1981) (Pet. App. 165a); PBGC Opinion Letter 86-27, 14 Pens. Rep. (BNA) No. 10 at 306 (Dec. 17, 1986), LEXIS, Labor Library, PBGC file (Pet. App. 172a), *cited in* Pet. Br. at 8 n.9, 26 n.17, 27, 31 n.20. These letters addressed plan terminations occurring before SEPPAA's effective date of January 1, 1986.

[19] H.R. Rep. No. 99-241, Pt. 2, 99th Cong., 1st Sess. 41-42 (1985).

[20] *Id.* at 41 (1985); *see* 29 U.S.C. § 1341(a) (1982).

[21] 29 U.S.C. § 1341(b) & (c) (Supp. IV 1986); H.R. Conf. Rep. No. 99-453, 99th Cong., 1st Sess. 575 (1985).

not guarantee.[22] A standard termination thus causes no losses to employees and retirees of accrued benefit commitments and imposes *no* liability on the PBGC.[23] The PBGC's complaints about replacement plans therefore have no conceivable relevance in the case of standard terminations.

If a pension plan lacks sufficient assets to pay all benefit commitments, an employer may voluntarily terminate the plan only through a "distress termination." 29 U.S.C. § 1341(c). In order to qualify for a distress termination, however, an employer must demonstrate "a financial inability to continue the funding of a plan." H.R. Rep. No. 99-241, Pt. 2, *supra*, at 48. SEPPAA requires that to effect a distress termination an employer must either (i) be liquidating under Chapter 7, (ii) be reorganizing under Chapter 11 and receive the bankruptcy court's approval,[24] or (iii) "demonstrate[] to the satisfaction of the [PBGC]" either that the employer "will be unable to pay [its] debts when due and continue in business," or that "the costs of providing pension coverage have become unreasonably burdensome." 29 U.S.C. § 1341(c)(2)(B).

These distress criteria limit voluntary terminations of underfunded pension plans "to cases of severe business hardship" and "extreme need." H.R. Rep. No. 99-241, Pt. 2, *supra*, at 29, 32. As the PBGC summarized in a 1987 report to Congress: "SEPPAA's distress standard effectively eliminates the opportunity for healthy firms to terminate underfunded plans at times of their choos-

[22] H.R. Conf. Rep. No. 99-453, *supra*, at 575; *see* 29 U.S.C. § 1341(b); *accord* H.R. Rep. No. 99-241, Pt. 2, *supra*, at 46.

[23] H.R. Conf. Rep. No. 99-453, *supra*, at 575; H.R. Rep. No. 99-241, Pt. 2, *supra*, at 46-47.

[24] As amended by PPA, in order to approve a distress termination a bankruptcy court must "determine that, unless the plan is terminated, [the employer] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. § 1341(c)(2)(B)(ii)(IV) (Supp. V 1987).

ing." *Promises at Risk*, *supra*, at 24. Or, as the United States succinctly puts it in its *amicus* brief, "a reorganizing company may terminate an underfunded plan only when the alternative is liquidation." U.S. Br. at 4.[25]

SEPPAA's stringent criteria for distress terminations therefore eliminate the PBGC's stated rationale for the Agency's opposition to replacement plans.

Nor does the possibility of an *involuntary* termination (the kind of termination involved in this case) provide a rational basis for the PBGC's "coinsurance" argument. By definition, involuntary terminations are undertaken *by the PBGC*. 29 U.S.C. § 1342(a). Accordingly, the PBGC's claimed need to "align the interests of employees with the PBGC and against termination," Pet. Br. at 28, is inapposite when the PBGC itself is terminating the plan.[26] The PBGC can, and no doubt will, refuse to terminate underfunded plans unless the Agency believes there is a sound economic reason for its action.

Finally, contrary to what the PBGC seems to suggest, *see* Pet. Br. at 29-30, an employer cannot force an involuntary plan termination upon an unwilling agency. An employer cannot simply refuse to fund its pension plans while depleting the plan's assets through the continued payment of benefits until the plan becomes "unable to pay benefits when due." 29 U.S.C. § 1342(a)(2). ERISA contains enforceable minimum funding standards for defined benefit pension plans, which prevent an employer from refusing to fund a pension plan. 29 U.S.C. § 1082; H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 283 (1974); H.R. Rep. No. 93-353, 93d Cong., 1st Sess. 14 (1973). Indeed, Congress has strengthened ERISA's minimum funding standards so as to prevent

[25] SEPPAA's restrictions have had their desired effect. The PBGC's most recent annual report states that "[i]n all of the distress terminations in FY 1988, the employer had gone out of business or would have done so had the plan not been terminated." PBGC, *Annual Report to the Congress: Fiscal Year 1988*, at 12.

[26] Indeed, in this case USWA sought to vacate the PBGC's involuntary termination of the USWA pension plans. *See supra* note 3.

a pension plan from simply running out of money and thus compelling an involuntary termination. 29 U.S.C. § 1082 (Supp. V 1987); 26 U.S.C. § 412 (Supp. V 1987). H.R. Rep. No. 100-391, 100th Cong., 1st Sess. 984 (1987); H.R. Conf. Rep. No. 100-495, 100th Cong., 1st Sess. 847-60 (1987).[27]

(ii) At the same time that Congress acted to restrict unnecessary terminations of underfunded pension plans, the Legislature also made other changes that work in the same direction. First, as noted, Congress increased employers' minimum funding obligations for ongoing pension plans so as to strengthen plans' balance sheets and thus reduce the potential need for future terminations. *See supra* at 20-21. Second, SEPPAA and PPA each increased an employer's liability in the event of a distress or involuntary termination. 29 U.S.C. § 1362 (Supp. IV 1986 & Supp. V 1987).[28]

[27] The United States refers to "[a] statement in the court of appeals' opinion" to the effect that if an employer is reorganizing under Chapter 11 of the Bankruptcy Code, the employer's obligation to fund its pension plan constitutes a pre-petition debt that is entitled to "no special priority." U.S. Br. at 22 n.18, quoting Pet. App. 23a-24a. The United States asserts that that statement, "if followed," would enable employers to refuse to fund a pension plan by going into Chapter 11, with the result that the PBGC would be induced to terminate such plans involuntarily. U.S. Br. at 22 n.18. The PBGC states, however, that the court of appeals erred in concluding that the funding of a plan "suffers," Pet. App. 24a, as a result of a Chapter 11 filing, *see* Pet. Br. at 37-38; for the PBGC maintains that pension funding obligations *are* entitled to priority in bankruptcy, *id.* at 38-39. The United States agrees with this view of the law. *See* U.S. Br. at 23 n.18.

[28] The increases in termination liability (i) reduce an employer's incentive to seek plan termination by making that option more costly, (ii) improve the PBGC's entitlement to recover from an underfunded plan's sponsor by repealing ERISA's original cap on termination liability of thirty percent of an employer's net worth, and (iii) make it possible for participants to obtain benefits in excess of guaranteed levels, even where employees and retirees lack a contractual claim to non-guaranteed benefits. H.R. Rep. No. 100-391, *supra*, at 123-25; Senate Comm. on Finance, *Explanation of Provisions Approved by the Committee on December 3, 1987 for*

Significantly, while it was taking these steps Congress refused to enact the PBGC's "coinsurance" theory into statutory law. Congress *rejected* a proposal to prohibit "follow-on plans," even though the PBGC urged that result. In early 1987, the Administration presented Congress its "Proposal on the Funding and Termination of Defined Benefit Pension Plans."[29] The Proposal sought restrictions on the adoption of replacement plans after an underfunded pension plan terminates:

> *Plan Reestablishments.* Except to the extent permitted by the PBGC, an employer (and its controlled group) would be precluded from establishing retirement programs which, in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits.[30]

Although Congress in enacting the Pension Protection Act included many of the reforms the PBGC sought, Congress *rejected* the PBGC's proposed restriction of replacement plans.[31]

Inclusion in Leadership Deficit Reduction Amendment, S. Print No. 100-63, 100th Cong., 1st Sess. 189-90 (1987); H.R. Rep. No. 99-241, Pt. 2, *supra*, at 41-42, 51-53; *see supra* at 16-17.

[29] The Administration Proposal is reprinted in *Overfunding and Underfunding of Pension Plans: Joint Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 28-61 (1987). The Proposal was jointly developed by the PBGC, the Department of Labor, and the Department of the Treasury, *see* PBGC, *Annual Report to the Congress: Fiscal Year 1987*, at 8, and the PBGC actively supported the Proposal before Congress. *See, e.g., Joint Hearing, supra*, at 11-12.

[30] *Administration Proposal, supra*, at 18, *reprinted in* Joint Hearing, *supra*, at 52.

[31] *See* H.R. Conf. Rep. No. 100-495, *supra*, at 879-85 (1987). Of the four committees that considered the Administration Proposal, the House Committee on Ways and Means was the only one that reported out a bill that would have restricted follow-on plans. *Ibid.* The Ways and Means Committee stated that its proposed amendment would have been a change in "present law." H.R.

b. Even if, contrary to what we have just shown, it were necessary and appropriate for the PBGC to be devising ingenious techniques to deter plans from terminating when the stringent termination criteria established by Congress have been satisfied, the Agency's ban on "follow-on plans" is a uniquely ill-conceived means to that end. The PBGC's policy is founded on numerous unstated assumptions, none of which is discussed, or even identified, by the PBGC. All of these assumptions are counterintuitive.

To begin with, the PBGC's restrictions on replacement plans may well *increase* the economic incentives for companies to terminate underfunded pension plans. By removing from the bargaining table a whole range of replacement benefit packages that a union might seek, including any real possibility of a new plan for persons already retired, *see supra* at 10-12, the PBGC's policy necessarily strengthens management's hand in bargaining, making it likely that the collective bargaining agreement that will emerge from post-termination bargaining will be less costly to management than would otherwise be the case. This should make termination *more* attractive to employers, not less.

In the face of this increased economic incentive to terminate, the PBGC's policy necessarily assumes that union or employee resistance will overcome an employer's economic self-interest in termination. Yet there is no explanation, either in the administrative record or in the PBGC's brief, as to why an employer's self-interest in achieving cost savings is not a stronger motivation than its desire to satisfy union or employee preferences. Obviously, no union is assured of receiving all its hopes in collective bargaining; many receive far less. And companies, especially financially troubled companies, often

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Rep. No. 100-391, 100th Cong., 1st Sess. 1010 (1987). Contrary to the PBGC's suggestion, Pet. Br. at 25, *no* congressional committee suggested that the PBGC's proposal was unnecessary because similar authority already existed under ERISA. *See, e.g.*, H.R. Rep. No. 100-1122, 100th Cong., 2d Sess. 56-57 (1988).

eschew a "smoother road" (*see* U.S. Br. at 20) in an effort to obtain a bigger pot of gold at the end of that road.

Moreover, the PBGC's "deterrence" rationale either proves nothing or proves far too much. An employer can choose to mollify union opposition to plan termination in any number of ways, such as by offering a wage increase or bonus. To use the PBGC's terms, an employer may attempt to repay the "coinsurance" premium from plan termination with higher benefits elsewhere, without incurring the PBGC's wrath. Such employer actions could have precisely the same purpose and effect—*viz.*, overcoming a union's objections to termination—as the PBGC discerns in replacement plans. Thus, the PBGC's logic leads to the conclusion that in order to prevent "abusive" plan terminations, the Agency must be given *carte blanche* to regulate *all aspects of employee wages and benefits* after a pension plan termination. Even the PBGC shrinks from that result.

Indeed, the PBGC does *not* object to a new *pension plan* as long as the plan does not make up for the particular losses to employees and retirees caused by the former plan's termination. *See supra* at 10-12. Rather, the PBGC objects in particular to replacement plans that give credit for past service. *Id.* That objection does not preclude the creation of a new prospective plan, even a very rich one, for *active* employees, but does preclude the creation of any benefits for persons who have already retired. The PBGC thus would allow active employees to have a new pension plan, even one more generous than the plan that has been terminated, as long as the active employees are willing to sacrifice the interests of retirees. While USWA was not willing to make that sacrifice, the PBGC offers no reason why other unions or unorganized employee groups might not gladly accept such a trade-off; indeed, the possibility of improving benefits for active employees at the expense of retirees might make plan termination affirmatively desirable to some employee groups. And one would think, in view of the policies of

ERISA, that such a sacrifice of retirees' interests is the last thing the PBGC would wish to encourage.

The ultimate indication that the PBGC's concept of pension insurance "abuse" has no logic behind it is the fact that the PBGC cannot even define with any precision what it is that makes one post-termination pension plan "abusive" and another not. *See supra* at 10-12. In the face of the recognition by both courts below that the USWA/LTV replacement plan does not fit the PBGC's own asserted definition of an abusive plan, Pet. App. 19a, 107a-109a; *see supra* at 10-11, the PBGC refuses to discuss these points, pleading that the Agency "must have flexibility" to decide when a plan constitutes an "abuse." Pet. Br. at 31 n. 20. If there were any logic or coherence to the PBGC's policy, the agency would not need to wrap itself in this protective cloak.

c. If the PBGC were to face up to the inconsistencies, counterintuitive assumptions and apparent illogic that underlie its "follow-on plan" policy, perhaps the Agency could somehow come up with a rational defense of its position—although none suggests itself. But as the case stands the PBGC has not explained, or even acknowledged, any of these matters. This in itself is fatal to the Agency's position.

The PBGC, like any other administrative agency, "must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 48 (1984). Here, the administrative record offers no explanation of the PBGC's policy choice, and the PBGC's Notice of Restoration simply recites in conclusory language that the replacement plan "results in an abuse of the pension plan termination insurance system." Pet. App. 182a. The record reflects neither that the PBGC "has considered [all] relevant factors," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), nor that the agency has articulated

a "satisfactory explanation for its action," *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43.[32]

As we have previously shown, the PBGC's prohibition of "follow-on plans" impedes the national labor policy by gratuitously interfering with free collective bargaining, and contravenes ERISA's central purpose of enabling employees and retirees to receive their full pension benefits. If the PBGC could show through reasoned and supported analysis that replacement plans such as the one involved here truly constitute an abuse that threatens the foundations of the insurance program, one could then debate whether those rights and interests should have to give way. But the perfunctory, illogical and unsupported analysis that underlies the PBGC's decision falls far short of establishing a legitimate ground for such a result.[33]

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[32] These deficiencies, of course, cannot be satisfied by "appellate counsel's *post hoc* rationalizations for agency action." *Id.* at 50; *accord Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

[33] As a final justification for its policy, the PBGC asserts that the adoption of "follow-on plans" somehow "negate[s] plan termination." Pet. Br. at 27. The PBGC asserts that because employees continue to receive something approaching their full earned benefits, "PBGC's insurable event—termination—has not in substance occurred." *Id.* at 29. This assertion is untenable. Whether the USWA/LTV pension plans have "terminated" within the meaning of the statute is a question of statutory construction, and ERISA admits of only one possible construction on this point. When the PBGC acts to terminate a pension plan, the plan is by definition terminated within the meaning of the statute. 29 U.S.C. § 1342. LTV's pension plans *have been* terminated by the PBGC's own action. Nothing in the statute or legislative history supports the notion that if certain types of pension benefits continue to be received, a termination somehow ceases to exist.

As we have seen, Congress' objective when it provided for the payment of nonguaranteed benefits was that to the extent possible employees and retirees would *not* lose accrued benefits after termination. *See supra* at 16-17. It therefore makes no sense to say that provision of such benefits is inconsistent with "termination." And, as we have noted, the PBGC cannot even define with any precision what types of benefits trigger the agency's "*de facto*" theory. *See supra* at 10-12.

Thus, the PBGC's attempt to create from whole cloth a distinction between "*de facto*" and "*de jure*" terminations must be rejected.

II. THE PBGC'S APPLICATION OF ITS "FOLLOW-ON PLAN" POLICY IMPROPERLY IGNORED CONTRACTUAL RIGHTS OF USWA THAT WERE NOT EXTINGUISHED BY THE TERMINATION

Separate and apart from the rights and interests that flow from *ERISA* favoring the receipt by plan participants of "their full benefits," 29 U.S.C. § 1001b(c)(3), in this case USWA had a *contractual* right to the continuation of benefits after the termination of the plans. The PBGC's opposition to the replacement plan in this case, which was established in settlement of the union's contract claims, improperly ignored the union's legitimate contract rights.

To place this point in context it should be understood that when a pension plan that is not created pursuant to a collective bargaining agreement is terminated, an employee generally has no *contractual* right to continue to receive benefits; his rights are limited to those affirmatively created by ERISA. Indeed, even where a collective bargaining agreement is applicable, such agreements typically do not contain provisions obligating the employer to provide pension benefits after plan termination.

USWA, however, has made a point of negotiating contractual guarantees of continued benefits, so that employees will have rights independent of ERISA to continued benefits after plan termination. For many years the agreements between USWA and LTV have included such a contractual guarantee. Thus, as the district court stated, the pension agreements in effect when the PBGC terminated the plans in question "did not limit LTV Steel's obligation to provide benefits in the event of termination of any pension agreements or termination of the pension plans or any pension trusts. Under the pen-

sion agreements, LTV Steel's obligations to fund and pay benefits continue beyond any termination of the agreements themselves." Pet. App. 38a.

The lower courts *and the PBGC itself* have recognized that nothing in ERISA overrides such a contractual obligation, because, as we have noted, the PBGC guaranty program is merely a floor, not a ceiling above which benefits may not rise. *See supra* at 15. Thus, as the courts below pointed out, *the PBGC* "filed a brief as *amicus curiae* in *Murphy v. Heppenstall*[, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982)] in which it supported the claims of [USWA] retirees to recover directly from the employer any non-guaranteed benefits to which the employer had contractually obligated itself and argued that nothing in ERISA imposes a cap on the payment of non-guaranteed benefits." Pet. App. 106a.[34] The Third Circuit in *Heppenstall* agreed with this position:

> ERISA established 'minimum standards' for pension payments due retired employees. Congress endeavored to guarantee retirees at least a portion of the payments a terminated pension plan would have afforded. *It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself.* [*Murhpy v. Heppenstall Co.*, 635 F.2d at 239 (emphasis added).[35]]

[34] The PBGC's *amicus* brief in that case squarely rejected the Heppenstall Company's argument "that Congress intended the liability imposed by 29 U.S.C. § 1362 to be a cap on an employer's obligation to pay pension benefits to its employees and the insurance limitations in 29 U.S.C. § 1322 to be a cap on an employee's right to receive pension benefits funded by his employer." Brief for *Amicus Curiae* Pension Benefit Guaranty Corporation at 3, *Murphy v. Heppenstall Co.*, Nos. 80-1690 & 80-1724 (3d Cir. 1980). Instead, the PBGC contended (correctly) that:

> ERISA . . . establishes only '*minimum standards* for the regulation of private retirement systems . . .' *Keller v. Graphic Systems of Akron*, 422 F. Supp. 1005, 1007 (N.D. Ohio 1976) (emphasis added). It does not impose a cap on the payment of other benefits. Consequently, *an employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA*. [*Id.* (emphasis added).]

The PBGC's position in *Murphy v. Heppenstall* is entirely inconsistent with its opposition to the replacement plan's payment of non-guaranteed benefits here.

In this case, when LTV ceased paying benefits following the PBGC's termination of the plans, USWA initiated an adversary proceeding against the company in the bankruptcy court, based on the same contract claim (and indeed, the same contract language, *compare* Pet. App. 38a n.5 *with* 635 F.2d at 235) as in *Heppenstall*, seeking payment under the collectively bargained pension agreements of "pension benefits provided by [USWA's] collective bargaining agreements with LTV Steel but not guaranteed by PBGC." *In re Chateaugay Corp.*, 826 F.2d 1177, 1178 (2d Cir. 1987). *See supra* at 8. That court urged the parties to settle USWA's suit. In the collective bargaining agreement that USWA and LTV proceeded to negotiate which established the replacement plan, the parties did precisely that. As the agreement recites and as the court below emphasized, that agreement constitutes a settlement of USWA's contract suit. *See PBGC v. LTV Corp.*, 875 F.2d at 1012, Pet. App. 8a; JA 166-67.

Thus, what the PBGC labels an "abuse" in this case is a good faith settlement of USWA's substantial claim based on its preexisting contract rights—rights which were in no way extinguished by the plan termination.[36]

[35] All other courts that have considered the issue have reached the same conclusion. *E.g.*, *Steelworkers v. Cyclops Corp.*, 860 F.2d 189, 196-97 (6th Cir. 1988); *id.* at 203 (Merritt, J., concurring); *In re M&M Transportation Co.*, 3 Bankr. 722 (S.D.N.Y. 1980); *Machinists Local 1574 v. Gulf & Western Mfg. Co.*, 417 F. Supp. 191 (D.Me. 1976); *Hurd v. Hutnik*, 419 F. Supp. 630 (D.N.J. 1976); *In re Alan Wood Steel Co.*, 4 Bankr. Ct. Dec. (CRR) 921 (Bankr. E.D. Pa. 1978); *see* S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 598 (1988).

[36] Pursuant to 11 U.S.C. § 1113, USWA's contractual claim on behalf of active employees and retirees also survived LTV Steel's

Murphy v. Heppenstall, *supra*. Nowhere in the administrative process did the PBGC confront this issue. Most significantly, the PBGC made no attempt to explain how its view that the replacement plan here constituted an "abuse" warranting restoration of the termination plans could be reconciled with the Agency's position in *Murphy v. Heppenstall*. The PBGC's failure even to acknowledge, much less to consider, this "relevant factor[]," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 416, leaves the Agency with no "satisfactory explanation for its action," *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43, 57.

CONCLUSION

For the reasons stated, the Court of Appeals' holding that the adoption of the replacement pension program provides no basis for the PBGC's restoration of the terminated USWA pension plans should be affirmed.

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filing for reorganization under Chapter 11 of the Bankruptcy Code and remained fully enforceable. *See, e.g.*, *In re Unimet Corp.*, 842 F.2d 879, 885-86 (6th Cir.), *cert. denied*, 109 S. Ct. 81 (1988); *In re Century Brass Products*, 795 F.2d 265, 272 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986).

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CASE NO. 89-390

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October Term, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN FACILITIES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER AND WILLIAM W. SHAFFER,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE THE STATE OF OHIO

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INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, the State of Ohio submits this brief as *amicus curiae* in support of the position espoused by the LTV Respondents. Ohio is the situs of a number of facilities formerly operated by LTV Steel Company, Inc. ("LTV" or "LTV

Steel") or its predecessor companies and is the home of several presently operating facilities.[1] Presently, LTV Steel employs approximately 9,800 persons in its Ohio facilities and has 24,500 retirees residing in Ohio. In 1988, LTV Steel paid approximately $572,000,000 in wages to Ohio employees. Approximately $25,550,000 in taxes withheld from those employees were transmitted to Ohio state and local taxing authorities. LTV Steel itself paid over $34,000,000 in taxes to Ohio state and local government. In addition, numerous business entities employing thousands of Ohioans are economically dependent upon LTV Steel's ability to successfully reorganize as a viable steel manufacturer.

This litigation potentially could have profound consequences upon a significant number of Ohio's citizens, its economy,[2] and its state and local government. The Pension Benefit Guaranty Corporation ("PBGC"), by pursuing a restoration order without any consideration of fundamental labor and bankruptcy policies, or even adequately considering the economic effect of restoration upon LTV Steel, has placed at risk the economic future of LTV Steel, its employees,

[1] Presently LTV Steel's Ohio-based operations are:
Corporate Headquarters - Cleveland, Ohio
Cleveland Works Steel Plant - Cleveland, Ohio
Tubular Plant - Cleveland, Ohio
Electrogalvanizing Plant - L-S E - Cleveland, Ohio (joint venture)
Lime Plant - Grand River, Ohio
Technology Center - Independence, Ohio
Ore Dock - Lorain, Ohio
Coke Plant - Warren, Ohio
Tubular Plant - Youngstown, Ohio
Tubular Plant - Elyria, Ohio
Electrogalvanizing Plant - L-S II - Columbus, Ohio (joint venture - under construction)

[2] The American Iron & Steel Institute estimates that every steel plant job creates four steel-related jobs. Every 100 steel and steel-related jobs creates 32 non- manufacturing support jobs in the immediate area. 1988 tax revenue in Ohio for Ohio jobs indirectly related to LTV Steel (steel-related and support) in 1988 was approximately $66,500,000 for an estimated 38,000 workers (and 144,000 dependents).

retirees, and those directly and indirectly dependent upon them. Moreover, by pursuing restoration, the PBGC is attempting to substantially improve its own bankruptcy claim to the detriment of all other creditors including the State of Ohio.[3] Manifestly, Ohio has a significant interest in this case.

STATEMENT OF THE CASE

1. Background

LTV Steel, headquartered in Cleveland, Ohio, is comprised of the remaining facilities of three major steel companies, Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company, and Republic Steel Corporation. Pet. App. 36a. LTV Steel was created by a merger of these companies in the hope that the combined entity would be more efficient and therefore better able to compete in the global market. Pet. App. 37a. Upon merger, LTV Steel assumed massive pension and other obligations resulting from prior plant closings. *Id.* As a result, LTV Steel's growing pension and retiree health liabilities rested on a shrinking employee base. In 1986, LTV Steel retirees outnumbered its active employees by a ratio of more than three to one.[4]

By 1986, LTV Steel was suffering record losses, declining steel shipments, and impending defaults under its credit arrangements. JA 152. On July 17, 1986, LTV Steel and its affiliates filed Chapter 11 bankruptcy petitions. *Id.*

[3] Ohio state and local taxing authorities have liquidated claims in the LTV bankruptcy totalling approximately $26 million. Other Ohio state claims of undetermined amounts are still pending.

[4] In 1986, LTV Steel had 77,182 retirees while its active workforce dropped to 24,544, yielding a ratio of 3.14 retirees per active employee. Pet. App. 37a. This employment shrinkage is indicative of the state of heavy industry in Ohio beginning in the late 1970s. For example, employment in durable goods industries in Ohio fell over 25% between 1978 and 1983.

2. Termination and "Restoration" of the Plans

After being advised in December, 1986 that LTV Steel could not and would not fund its pension plans, JA 126, the PBGC instituted involuntary termination proceedings with respect to LTV's three remaining pension plans (one had already been terminated) in the United States District Court for the Southern District of New York. JA 321-22. The United Steelworkers of America ("USWA"), the exclusive bargaining representative of the vast majority of LTV Steel's hourly employees, challenged the proposed termination, but the District Court and, later, the Court of Appeals for the Second Circuit, found for the PBGC. *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197 (2d Cir. 1987). The plans were terminated effective January 13, 1987. JA 141-42.

The USWA then instituted an adversary proceeding in the Bankruptcy Court seeking to hold LTV Steel liable for the terminated pension benefits under the provisions of the 1986 collective bargaining agreement between LTV Steel and the USWA. Pet. App. 43a. After months of difficult, tense, and complicated negotiations, the USWA and LTV Steel reached an agreement, the term of which was limited to the period of LTV Steel's reorganization. JA 154. Under the terms of the agreement, the USWA made concessions which LTV Steel estimated would save it $50 million per year. In exchange, LTV Steel agreed to an array of new programs designed to replace some of the benefits lost as the result of the involuntary termination of the pension plans. JA 154-167.[5]

In July 1987, the Bankruptcy Court approved, over the objection of the PBGC, the collective bargaining agreement as an interim measure, finding that it was necessary for LTV Steel's bankruptcy reorganization. JA 258-61. The Bankruptcy Court concluded that "the implementation of

[5] The new programs differ significantly from the terminated pension plans as follows: 1) none of the new programs are covered by guarantee coverage provided by PBGC; 2) many of the programs are provided through purchase of insurance, not pension coverage, and 3) retirement qualifications were toughened. Pet. App. 109a.

these agreements will help resolve some of the most troubling issues raised to date in this bankruptcy case and will help to alleviate the extreme hardship suffered by Debtor's retirees and employees, as has been shown to exist in the cumulative record of these proceedings." JA 259.

In September 1987, the PBGC, having attempted without success to prevent approval of the collective bargaining agreement in the Bankruptcy Court, attempted to "restore" three of the four terminated pension plans. Pet. App. 182a. The PBGC asserted two grounds for its restoration decision. First, it argued that the interim establishment of new programs replacing some lost pension benefits was an "abuse" of the pension insurance system. Second, it asserted in the months that had elapsed since terminations, LTV Steel's finances had improved such that it could afford the plans. *Id.* Subsequently, the PBGC asked the United States District Court for the Southern District of New York to enforce its restoration order.

The District Court, in *In Re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988) (Pet. App. 28a), refused enforcement and its determination was affirmed by the Second Circuit Court of Appeals in *Pension Benefit Guaranty Corporation v. LTV Corporation,* 875 F.2d 1008 (2d Cir. 1989) (Pet. App. 1a). Both the district court and the court of appeals found that PBGC's decision was arbitrary and capricious. First, they found there was no basis in the Employee Retirement Income Security Act of 1974 ("ERISA") for concluding that the interim plans were an "abuse" of the pension insurance system. Second, the district and appellate courts held that the PBGC never considered the fundamental federal bankruptcy law and labor law policies affected by restoration. Third, they concluded that the agency did not prove, as it had to, that LTV Steel's financial condition had improved to the point where LTV Steel could afford restoration. In this regard, the PBGC was faulted for engaging in no analysis which showed that the company's improved condition was anything other than that which would be expected of any other Chapter 11 debtor-in-possession. Moreover, the courts observed that the PBGC's analysis failed to take into account the fact that the

cash accumulated in Chapter 11 was required to benefit all creditors, not just the PBGC. Finally, the courts determined that the PBGC failed to consider the financial effects of possible retermination. Accordingly, the district court declined to enforce the PBGC's restoration order and the court of appeals affirmed that determination.

SUMMARY OF ARGUMENT

The power of the PBGC to order the restoration of pension plans under the authority of Section 4047 of ERISA, 29 U.S.C. §1047, cannot be considered without reference to other important and relevant federal policies. Specifically, where the PBGC attempts to order restoration of involuntarily terminated pension plans because it has determined that a collective bargaining agreement between a Chapter 11 debtor-in-possession and the union representing its employees provides new programs to replace, in part, benefits lost due to termination, it must first consider the federal policies embodied in the bankruptcy and labor laws.

The fundamental purpose of reorganization is to help a debtor avoid liquidation, so as to preserve jobs and avoid misuse of economic resources, while promoting the equitable distribution of the debtor's assets to creditors. *NLRB v. Bildisco,* 465 U.S. 513, 528 (1984). A second federal policy, that of supporting and encouraging collective bargaining as a means of resolving disputes between employers and employees, is not diminished when an employer files a Chapter 11 petition. Through the enactment of Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113, Congress has insured the importance of collective bargaining is recognized in the bankruptcy setting.

Had the PBGC given adequate consideration to federal bankruptcy and labor policies, it would not have found that the collectively bargained 1987 replacement benefits abused the pension insurance system. Rather, it would have found that they were part of an agreement negotiated in good faith and in accordance with the obligations imposed on each

side by law. Moreover, the agreement reached was necessary to achieve the goal of rehabilitaton for LTV Steel. As such, the agreements comported with principles of labor and bankruptcy law, did not violate ERISA, and advanced the interests of LTV Steel, its employees, retirees, creditors, and the State of Ohio.

While it cannot be disputed that Section 4047 of ERISA authorizes the restoration of an involuntarily terminated pension plan if an employer can afford its administration and funding, that provision does not authorize restoration in the absence of adequate evidence or analysis with respect to that question.

The district court, as required by *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416-17 (1971), required the PBGC to make a reasoned decision taking into account all relevant information. The PBGC did not do this. There is no assurance from the record developed by the PBGC that restoration of the plans would not result in the destruction of LTV Steel's attempt to reorganize, or even that retermination would not be likely. While Ohio does not argue that these consequences necessarily would flow from restoration, it does note that there is no way to make such a determination on the present state of the administrative record. Given the profoundly negative consequences to all concerned, including the State of Ohio and its citizens, of either liquidation or retermination, a decision by the PBGC to restore the LTV Steel plans should not have been made in the absence of adequate evidence or analysis.

ARGUMENT

I. THE PBGC ACTED UNREASONABLY BY FAILING TO CONSIDER FUNDAMENTAL FEDERAL BANKRUPTCY AND LABOR LAW POLICIES WHEN IT ATTEMPTED TO RESTORE THE INVOLUNTARILY TERMINATED PLANS.

In its brief, the PBGC continues to assert that Section 4047 of ERISA (A.3) grants it plenary authority to restore involuntarily terminated pension plans under its "abuse" policy, authority which permits it to ignore important federal policies embodied in bankruptcy and labor laws. Similarly, PBGC argues that it need not consider the possibility that restored plans might shortly have to be reterminated. Pet. Br. at 35, 39.

These views as espoused by the PBGC are particularly disturbing to the State of Ohio. It is critical that the valid interests of a state in the continued viability of industry within its borders and the well-being of employees and retirees of those industries be considered. Moreover, a state's status as a creditor seeking protection of its claims under Chapter 11 should not be forgotten. The State of Ohio believes that consideration by the PBGC of fundamental federal bankruptcy and labor law policies would have allowed these important state concerns to be adequately addressed.

The goal of Chapter 11 of the Bankruptcy Code is the successful rehabilitation of the debtor. *NLRB v. Bildisco & Bildisco*, 465 U.S. 512, 527 (1984). Recognizing that "[i]t is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets," Congress has long favored reorganizations. H.R. Rep. No. 595, 95th Cong., 2d Sess. 220, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6179. See, also, *NLRB v. Bildisco & Bildisco*, 465 U.S. at 528, citing to the same report ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.") As noted by the Court of Appeals, "the results of reorganization are the shielding of the debtor from the financial pressures imposed by its creditors and the promotion of the equitable distribution of the debtor's assets to its creditors." 875 F.2d at 1016 (citing *NLRB v. Bildisco*, 465 U.S. at 528 and *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983).

The State of Ohio is concerned by the PBGC's refusal to consider this fundamental policy, as is evidenced by the

agency's assertion that the cash accumulated by LTV Steel during the reorganization demonstrates that LTV Steel can afford the terminated plans. Such funds are to be used to satisfy the claims of all creditors, not merely to satisfy the claim of one to the detriment of all others. Moreover, the accumulation of funds as a result of reorganization offers scant support for the proposition that a debtor can afford previously terminated pension plans.

In this case, a second federal policy must also be considered. For over a half-century, the Nation's labor policy has been to mandate and support the collective bargaining process as the method of resolving disputes between employers and employees, thereby promoting labor peace. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981). *See also* 29 U.S.C. §151 (encouraging collective bargaining is "declared to be the policy of the United States"). This obligation applies with respect to the provision of pension benefits. *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971) (non-wage benefits such as group health insurance are mandatory subject of bargaining); *In Re: Century Brass Products, Inc.* 795 F.2d 265, 274 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986) ("pension and insurance benefits for active employees" are mandatory subjects of bargaining).

The duty to collectively bargain is not extinguished by the filing of a Chapter 11 petition. *NLRB v. Bildisco & Bildisco*, 465 U.S. at 523. In *Bildisco*, this Court recognized the special nature of collectively bargained contracts but held that such agreements were not to be treated in a reorganization proceeding differently from other contracts. 465 U.S. at 527. Congress responded by enacting Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113, (A.1), which expressly extended into the bankruptcy setting the goals and policies of federal labor law. *Century Brass*, 795 F.2d at 273.

The USWA and LTV Steel brought to the bargaining table the issue of new pension benefits not for the purpose of

abusing the pension insurance system, but to meet their obligations under the Bankruptcy Code and federal labor law. The resulting agreement was entirely consistent with these important federal interests, as well as the policies embodied in ERISA. LTV Steel's employees and retirees were relieved of the extreme hardships which occurred when their benefits were in significant part cut off by the plan terminations. In exchange for the new benefits, LTV Steel achieved agreements from the USWA that it estimated would result in annual cost savings of $50 million, settlement of the adversary proceeding instituted by the USWA for breach of its 1986 collective bargaining agreement, and labor peace. As the Bankruptcy Court noted, ". . . the terms and payments contemplated by the agreements . . . are clearly necessary and appropriate to the goal of rehabilitation for the Chapter 11 debtor." JA 260.

Because the interests of the employees and retirees of LTV Steel, its creditors, the State of Ohio, and the company itself were plainly advanced by the 1987 collective bargaining agreement in a manner consistent with the principles of bankruptcy law, federal labor law, and ERISA, the judgments of both the district and appellate courts concluding that the agreements did not abuse the pension insurance system were correct and should be affirmed.

II. THE PBGC ACTED UNREASONABLY WHEN IT ORDERED RESTORATION IN THE ABSENCE OF EVIDENCE OR ANALYSIS SUFFICIENT TO DEMONSTRATE THAT LTV STEEL COULD AFFORD TO FUND AND ADMINISTER THE PLAN.

The PBGC's erroneous refusal to consider applicable federal bankruptcy and labor policies manifests itself in its determination that LTV Steel could afford restoration of the three terminated pension plans. In particular, the PBGC's failure to consider the goals of reorganization may have caused it to eschew analysis of LTV Steel's long-term financial health and thereby ignore matters of vital concern to Ohio, i.e., the impact of restoration upon a number of Ohio

citizens and the state's economy.

The State of Ohio does not dispute that, under Section 4047 of ERISA, PBGC may restore an involuntarily terminated pension plan if an employer can afford it. The State of Ohio does not believe that Section 4047 grants to the PBGC authority to base affordability conclusions on insufficient evidence and analysis. The district court appropriately subjected the PBGC's affordability determination to a "thorough, probing, in depth review" as required by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416-417 (1971), "to determine whether the agency's decision-making process was reasoned, took into account all relevant policies and information, and reached a result consistent with congressional intent." 87 B.R. at 807. Here, the PBGC simply did not adequately consider what effect restoration would have on the company's prospects for continued existence. To blindly make such a critical decision is risky indeed.

There is no assurance from the record developed by the PBGC that restoration of the three terminated pension plans would not destroy LTV Steel's attempt to reorganize with the result that it would be placed in liquidation. Even excluding this possibility, there is likewise no basis in the PBGC's administrative record from which to conclude that LTV Steel could administer these pension plans without the likelihood of retermination.

Either of these consequences would have grave implications for the state of Ohio. Liquidation would throw thousands of Ohioans out of work. The State's unemployment compensation system and workers compensation systems would be affected dramatically.[6] And, as noted earlier,

[6] LTV Steel's annual workers' compensation payouts in Ohio are presently $16.5 million; it is estimated that present outstanding claims liability is $28 million. LTV estimates that it will pay $2.5 million in unemployment compensation taxes to the State in 1990. If all LTV Steel employees were laid off, it is estimated that the State would pay affected employees $2,730,000 per *week.*

substantial tax revenues would be lost. Moreover, thousands of former LTV Steel employees - both those laid off and those retired (and their dependents) - would lose their health and life insurance benefits, not to mention substantial portions of their retirement income. The effect on the State's economy would be devastating.

Even the less drastic possibility of retermination yields results which would impact Ohio adversely. Retirees would again be left in a condition of extreme hardship. Also, instability in the workforce, such as strikes, might ensue.

Ohio does not argue that either liquidation or retermination will result if the terminated pension plans are restored. There is no way that such a determination can be made on the present state of the PBGC's administrative record. As noted by both the district and appellate courts, the PBGC's affordability determination was premised on: a review of operating income figures for too short a period; an "unexplained and unexamined" assumption that LTV Steel would be granted previously denied or revoked Internal Revenue Service contribution waivers and that the USWA would, in the face of restoration, maintain in place the concessions that resulted in annual savings to LTV Steel of $50 million; analysis of LTV Steel's cash flow without considering the effect of Chapter 11 upon it or the right of other creditors to their fair share of those funds; and an exclusive focus on short term factors. 875 F.2d at 1019-20. The PBGC's analysis could neither accurately determine affordability nor measure the effect of restoration on the interests of others, including Ohio. Certainly more is and should be required of the PBGC to justify decisions of such a critical nature.

The analysis employed by the district court and court of appeals in reviewing the PBGC's affordability determination was appropriate and correct, for it provides a framework for accurately determining not only whether a business can in fact bear the cost of a restored plan but the impact of restoration on the legitimate interests of the states within whose borders the companies, the employees, retirees, and

creditors reside. The conclusion of the lower courts that the PBGC's affordability analysis was inadequate should be affirmed.

CONCLUSION

This Court should affirm the unanimous decisions of the district court and the court of appeals which have given exhaustive consideration to this matter. The PBGC should not be permitted to administer ERISA in a vacuum ignoring fundamental national bankruptcy and labor policies to the detriment of the states and their citizens.

Respectfully submitted,

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APPENDIX TO THE BRIEF OF AMICUS CURIAE

Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113.

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and (3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized

representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by the collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Section 4047 of ERISA, 29 U.S.C. §1047.

Whenever the corporation determines that a plan which is to be terminated under section 1341 or 1342 of this title, or which is in the process of being terminated under section 1341 or 1342 of this title as a result of such circumstances as the corporation determines to be relevant, the corporation is authorized to cease any activities undertaken to terminate the plan, and to take whatever action is necessary and within its power to restore the plan to its status prior to the determination that the plan was to be terminated under section 1341 or 1342 of this title. In the case of a plan which

has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under the subchapter, to take such action as may be necessary to restore the plan to its pre-termination status, including, but not limited to, the transfer to the employer or a plan adminstrator of control of part or all of the remaining assets and liabilities of the plan.